United States Court of Appeals
for the Second Circuit

JOINT APPENDIX

76-4179

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P/S

United States Court of Appeals
For the Second Circuit

The Great Atlantic & Pacific Tea Company, Inc.,
Petitioner,

v.

Federal Trade Commission,
Respondent.

ON PETITION FOR REVIEW OF ORDER OF THE FEDERAL TRADE COMMISSION

JOINT APPENDIX

VOLUME III
Pages 1609 to 2399

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gallons until we had all the lines moved in.

My recollection is that the completion of the entire move from Chicago and Hammond to Woodstock took until about, well early 1966, the latter part of 1965. . There was a period there where it was a period of transition.

Q Now you mentioned moving the various lines. What do you mean by the lines, sir? Could you give us a description of what would be included within this term?

A Well, a production line for half gallons of milk, for example, you are involved with a filling machine and an assembler that picks up a group of cartons and sets them down into a carrier to be paletized, so what you do in a new plant, I think this is pretty standard practice, your employees have to get used to the new equipment and the arrangement in the chill room where your packaged product is stored.

So you start with one very important item and get it flowing smoothly and then you bring in another item like I mentioned, the glass gallons, that is a totally different line, a different type filling machine and a different type of assembler, stacker, everything is different, and then you bring in cottage cheese, then you bring in chocolate milk.

You bring in item after item until you get it all flowing smoothly then you close down the other operations completely.

Q Now would all of these products, the milk and the cottage cheese and the chocolate milk and similar items be generally known as the milk line of products?

A That is right.

JUDGE HINKES: Were the Chicago and Hammond plants both milk and ice cream?

THE WITNESS: No, the plants that I have been referring to, there is a Chicago milk processing plant, milk only, and a Hammond milk processing plant milk only. The ice cream manufacturing was a separate plant and it continues to this day separate from milk.

JUDGE HINKES: So that the Woodstock operation didn't effect the ice cream plant at all?

THE WITNESS: Not at all.

By Mr. Mathias.

Q When you mention milk plant you were talking about a plant that would produce a product line of milk products, is that correct, sir? It is just milk that is processed at each of these plants? In other words you do have cottage cheese, sour cream?

A Oh yes, all of the milk line I think is the way to say it.

Q Would you give us a brief approximate description of the products that would be included within the milk line?

A Well, you have milk quarts, paper containers, milk homogenized Vitamin D milk in half gallon paper containers, also paper gallons in some locations. Other locations may be just glass gallons. Chocolate milk quarts. You have skim milk quarts and skim milk half gallons. Cottage cheese, large curd, small curd, in a couple of sizes. Sour cream, well I know I am leaving out some things.

Q Two percent milk?

A That is right, thank you.

Q So that these products and possibly a few others would constitute the milk line of products and when you are discussing a milk plant you are discussing a plant that could ---

A Could handle all of them.

Q Now, did the Woodstock process make the entire milk line of products?

A Oh, yes.

Q You had mentioned earlier that you probably started in the Woodstock area with the half gallons because this was a very important item.

Was the half gallon at this period of time in the mid-1960s your most important item in the Chicago area in terms of volume?

A I believe so.

Q Did you also in the Chicago metropolitan area have any other types of facilities besides the processing plant such as distribution depots, receiving stations?

A Yes, we had a milk distribution location near O Hare in Roseland. This was the spot where packaged product was received from Woodstock after we got Woodstock going. The product was brought into this distributing location. It was palletized ~~and~~ on the semis which brought it in and the product was moved into chill rooms right there and loads for retail and wholesale routes were then assembled and sent out from that distributing location.

Q This would be on smaller trucks?

A That is right.

Q Did you also have a distribution station in Hammond?

A Yes.

Q And this would be following the ---

A Similar pattern.

Q Do you recall approximately what distribution area was served out of the Hammond distribution center?

A Well, the northwest corner of Indiana including South Bend and the southwestern corner of Michigan were served out of there. Hammond, Gary.

Q Did any portion of the milk supplied to Hammond come back into Illinois on routes adjacent to the Indiana line by any chance?

A I don't think so. I am not sure about that. I really don't know.

Q In addition to processing plants and plant distribution depots from the Chicago area, did Borden also have any receiving stations in this area?

A No. Now, in this area, in the Chicago ---

Q Right in the Chicago metropolitan area.

A You are talking about milk receiving stations, right?

Q Yes, sir.

A Well, we received our milk at Woodstock after that plant got into operation and this was where it was all brought in.

Q So all of the raw milk came directly from the farm into Woodstock then, is that right?

A Well, not quite directly all from the farm to Woodstock. You have haulers, pick up people that were directing milk in the area adjacent to our Woodstock plant so that you can say I guess came in direct from the farm. Then you bought milk also from the pure milk association, your additional supplies, and that may have come from, oh, as far north as New London or further in Wisconsin. We call it the Chicago milk shed or down into Illinois and into Indiana a ways.

In other words, if I understand you this direct isn't all direct from the farm. Some of it flows through another channel.

Q In other words, a portion of your raw milk supply came from the pure milk association?

A That is right.

Q And when you speak of the raw milk shed for the Chicago area, what do you mean by that, Mr. Minkler?

A Well, only in the most general terms can I give you an answer. It is roughly an area around this huge metropolis that the milk processors in Chicago look to for their supply of milk and of course eventually you get out so far it is uneconomic, but you are requiring the volume of a rather large area of milk producers to satisfy the needs of the market and that area is called the Chicago milk shed.

Q And this milk shed as you described it before includes portions of Wisconsin and Indiana?

A Very much so. Wisconsin probably more -- definitely more than Indiana and then some down into Illinois too.

Q Now, to get away from just the Chicago metropolitan area for a moment and concentrate on the Chicago Central District, did the Chicago Central District have other milk plants and ice cream plants other than those in the Chicago area?

A They did.

Q Can you tell us approximately how many milk plants you operated outside of Chicago and to the extent possible their location?

A All right. Milk plants first.

Q Yes, sir.

A A milk plant in Madison, Wisconsin. A milk plant in Milwaukee, Wisconsin. A milk plant in DeMoines, Iowa. A milk plant in Rock Island, Illinois, a milk plant in Pekin, Illinois. Then of course, Woodstock after the other two

/Wee

interrupt before but so far as I know, this case has nothing to do with ice cream and I don't know why we are spending any time on it at all.

MR. MATHIAS: Your Honor, we are just probing the operation of the Chicago Central Division of the Borden Company.

JUDGE HINKES: I don't know why you want to get deeply involved in that.

MR. MATHIAS: Your Honor, I do not intend to get deeply involved.

By Mr. Mathias.

Q Now, Mr. Minkler, we mentioned earlier the question of receiving stations. Did the Chicago Central District operate receiving stations in any area?

A Historically they did, but I can't give you the times. There was a time when we had a lot of receiving stations and then we were collecting milk into a Lake Geneva receiving station, New London, we had a number of them, but over the years those all phased out and we began getting our state supplies, that is supplies from out of Wisconsin through the pure milk association and closed up the receiving station.

Q Mr. Minkler, a moment ago you noted that at the processing plants, Woodstock in particular, that you received the milk, pasteurized it, and bottled it. Would you give us a brief description of the pasteurization process?

A Well, I don't know how technical I can be. We used to pasteurize milk in advance, but when this new plant was built you had what was practically instant pasteurization. It was called short time and the milk is popped through a series of super heated plates and is brought up to I think 160 degrees almost instantly from the storage temperature it had been kept at in the trucks, that was around 40, 42, it comes into the plant pumped out of the tank trucks, goes through a clarifier, is pumped through a pasteurizer then flows to the bottling machines.

Q And this process you explained it as almost instant use?

A The pasteurization, yes, sir. Right now it just flows through. I can't give you the volume permit any more but it is a continuous process. Short time pasteurization it is called.

Q And then is the milk cooled immediately after this?

A Oh yes, after the pasteurizing it goes through what is called a homogenizer which forces the milk through valves under high pressure to disperse the butter fat ~~globals~~ globules and that is where you get the name homogenized milk. The cream doesn't rise.

If you are as old as I am, you would remember that you used to buy milk and on your door step in the morning there would be a head of cream. You don't get that any more.

Q Now is it the practice of the Borden Company to get the

the milk from the trucks and through the plant and to the consumer as quickly as possible.

A Oh, yes.

Q How long normally would the period be from the time that milk would come into the Woodstock plant until it was shipped out of your cold room to the store?

A It comes in in I would say 20, 24 hours at the outside. I mean it is flowing all the time.

Q This is to insure that the milk is as fresh as possible when it gets to the consumer, is that it?

A Of course.

MR. McINERNEY: Just as a point of clarification, may I inquire whether that includes going through the distribution point?

THE WITNESS: Probably not quite, but I mean you are moving what you recognize to be a highly perishable product and you want to build the reputation for having milk that lasts in the housewife's refrigerator as much as a week or more so you move it. This is part of the technology.

MR. McINERNEY: In your estimate your weren't including the time it would take to go through your Hammond distribution point.

THE WITNESS: That is right, I am not.

By Mr. Mathias:

Q Now, Mr. Minkler, I am not sure that this point was

MR. MATHIAS: All right, strike the question.

By Mr. Mathias:

Q From the mid 1960, 1964 and 1965, what was the position of Joseph Malone in the Chicago Central District?

A Well in 1964-65 specifically he was a Vice President with the title Vice President Regulatory Controls.

Q And in this position what were his duties?

A He was primarily involved with keeping abreast of any state or federal regulations affecting our business and consulting with our people and conformance and interpretation, that sort of thing.

Q Now, did he serve directly under you or did he serve under some other head in this division?

A He served under me.

Q So Mr. Malone reported directly to you?

A That is right.

Q At this period of time, was he a part of the manegement group of the Chicago Central District?

A Oh, yes.

Q Did he participate in matters and problems other than governmental controls?

A He did considerable cost analysis that was required from time to time.

Q This would be in connection with any matter that you required cost accounting?

A That is right.

Q Was Mr. Malone your principal advisor insofar as cost problems were concerned in the District?

A Yes, he was.

Q And did he have any other duties aside from these cost accounting duties and his duties as a consultant on governmental and state controls?

A Well, just in a general sense he was as you have already asked me if he was a part of the management group. He certainly was. He was involved in decision making discussions and as to additional specific assignments I guess I can't answer you.

I don't know just what you mean.

Q Well, as a part of the management group if there was a major problem of any type involving the Chicago Central District, was he involved in discussions?

A Yes, he was.

Q And was this considered a part of his duties with the Chicago Central District to consult and participata in such problems?

A Absolutely.

Q Now, prior to being appointed Vice President of Regulatory Controls, in what position did Mr. Malone serve?

A For a number of years he was District Comptroller. He was the top accountant for the District.

Q And in the course of his duties as Comptroller, do you know if Mr. Malone conducted any cost studies as to the cost of the Borden operations in various parts of the Central District?

A Well, I think you kwould have to phrase your question somewhat differently for me to answer. If you mean that --- you know you can go in and make a cost analysis and get a whole time together and do time studies, motion studies that are highly complex and very involved -- is that what you are getting at?

Q Did he perform this type of cost study?

A Not to the extent where you would bring in an outside organization to help you. He was always involved with cost analyses in all our plants but I just have to answer you generally. That was part of the Comptroller's work.

Q Approximately when was Mr. Malone appointed to Vice President of Regulatory Controls?

A Well it must have been in the end of 1963, the beginning of 1964.

Q And prior to that for a number of years he had served as the District Comptroller?

A That is right. Maybe he was Vice President of Regulatory Controls at the beginning of 1963. I can't give you the exact time.

lyj Q Mr. Minkler, was there a man by the name of Orville Gosse

fls who was an official from the Borden Central District?

y-1 fls

A Yes.

Q In the period 1964 through the termination of your employment with the Borden Company, whatposition did Mr. Goss serve?

A he was manager of both Chicago milk and ice cream operations.

Q So that he then would have been the first line of administration over the ice cream plant in Chicago and the Woodstock plant, would that be correct?

A That is right.

Q What geographic area did this Woodstock plant in general serve?

A Well, as I thought I described, it took the place of the Chicago fluid milk plant and the Hammond plant, and took on the processing of the milk for those that had formerly flowed through those two operations.

Q So it served basically the area that the two prior plants had to serve?

A Now as time went on quite naturally they, on occasion, would take on the supplying of some item or items for other locations, like Rock Island or Pekin. I can't giveyou any details of that. Maybe they would help them on cottage cheese production or some other item.

MR. MATHIAS: Your Honor, one of my co-counsel note that in response to my question as to whetheror not the he and Mr. Tarr discussed private label milk with A&P?

MR. MATHIAS: I was referring, Your Honor, to Mr. Malone's participation, and I believe both the witness and I understood the question to refer only to internal Borden discussions.

JUDGE HINKES: Yes.

By Mr. Mathias:

Q Now that the question has been clarified, did Mr. Malone ever participate in discussions with A&P during the course of the negotiations?

A Yes, he did.

Q Mr. Minkler, who was in charge of the dealings with A&P in connection with private label milk and dairy products?

A I presume I was. I am sure that Gordon Tarr had more conversations with the customer, far more than I did, but we were consulting on this continuously.

Q And when you say "we," you mean you, Gordon Tarr and Joseph ---

A And Joseph Malone, yes.

Q How did you first become aware of A&P's interest in purchasing a private label milk and dairy products in the Chicago area?

A By word that Gordon Tarr conveyed to me in the fall of 1964. He began to come back from his regular calls on this customer, and dropped the word to me that the customer was

regularly bringing up questions about private label and evidencing his interest in private label milk.

Q Mr. Tarr was calling upon A&P quite frequently then, is that correct, sir?

A Yes, right.

Q And who did he deal with primarily at A&P?

A Elmer Schmidt.

Q And when this fact was referred to you by Mr. Tarr, did you report this to your superiors in New York?

A Yes, I did.

Q And did you keep them informed of the course of dealings between Borden and A&P at the Chicago level?

A Any ~~more~~ move from Borden advertised brand to a private label was a matter of great concern to me and to anyone in management in the company, and as soon as this interest on A&P's part became evident and they repeated the interest, kept asking questions about what we might do, I certainly kept New York completely informed.

Q Who did you discuss this matter with in the New York office?

A Mr. Harry Archer to begin with until he moved up to Executive Vice President of the Corporation, and then after that with Mr. J. B. Pentz.

Q Why were you concerned about a move from Borden label to private label?

A We, over the years, had accomplished, we believed, a wide recognition of our brand name. We had done a tremendous amount of very important dramatic advertising in the Chicago market. This was back in "Elsie the Cow" days. Maybe some of you remember our trade character. We felt we had a tremendous franchise built up and we were greatly disturbed at the possibility of seeing our biggest customer toss it away.

Q When you refer to this advertising program back in Elsie the Cow days, approximately what year period would that be?

A Oh, Elsie, that program began way back in 1933 at the first World's Fair, and built steadily through the forties and fifties. It was really quite dramatic.

Q But at this period in the middle sixties, you were not engaging in this big Elsie the Cow program?

A Oh, yes, we were. We were still very strong on supporting our brand merchandise.

Q So you were still very concerned with the preservation of your brand identity?

A That is right.

Q Were there any other problems other than the loss of brand identify with which you were concerned in switching to private label?

A Yes, of course. We had no idea what our customer had in mind beyond having an Anne Page milk, or whatever it would be, and we knew it would be out of our control from then on. This concerned us.

Q Were you concerned with any possibility of increased costs due to diversification of lines within your plant?

MR. McINERNEY: I object, Your Honor. I think that the motivations of the Borden Company have been gone into in considerable detail. I don't know what their concern about the customer tossing the Elsie the Cow advertising out has to do with the case, but furthermore, I haven't objected up to this point, but Mr. Mathias has from the very beginning been leading this witness at a great rate.

I think we are reaching the point where we are dealing with negotiations between the parties, and I think he ought to be able to testify in the ordinary course instead of having Mr. Mathias put words in his mouth.

MR. MATHIAS: Your Honor, every question that is answerable as yes or no is not a leading question unless it suggests a particular answer. I would respectfully submit that my last question has not suggested any particular answer to this witness, and that it was a proper question, and the considerations which Borden went through at the beginning and during the course of these negotiations I think are very important to an understanding of the ultimate agreement that was reached.

JUDGE HINKES: Of course it is important, but that is not the issue. The issue is whether the question is leading, and I do think it was leading. You can simply ask the witness to recall as much as he can recall of the matters that you are inquiring about, motivation, and when he has finally reached the end of his recollection, it is then appropriate to ask the leading question.

I say this only because you harm your own case in propounding leading questions. The answers that are given to leading questions are not nearly as probative as proper answers to proper questions, and if you wish to put the best coloration upon your case, you should try to avoid leading questions as much as possible.

MR. MATHIAS: I will strike the last question, Your Honor.

By Mr. Mathias:

Q Were there any further problems with which you were concerned in the possibility of supplying a customer private label milk?

A Yes.

Q What would those be, sir?

A The complications in the processing plant; complications in delivery.

Q What complications do you have in mind, sir, in the processing, for instance?

A In the processing plant when you are working with a single brand, your own, there is no interruption in the flow of an individual item until the run is completed for that day and it is put into its place in the chill room, and you have got one item instead of two or more if you had more than one private label. As you add private labels, your whole process of filling and storing and shipping is obviously complicated and adds to cost.

MR. McINERNEY: I wonder if the witness is really qualified to testify with respect to costs. May we inquire as to whether he has done any cost studies?

JUDGE HINKES: Let me instruct the witness. In answering any question, you should only answer to the best of your knowledge and experience, and if you do not have this knowledge of your own, I think you should answer then that you don't know or that your answer is dependent upon whatever source of information you have.

MR. WHITE: I might point out, Your Honor, as I understand, what the witness is testifying to is what he was worried about in the fall of 1964, not what in fact happened necessarily.

JUDGE HINKES: That is what I understand his testimony to be, also.

MR. WHITE: Whether these problems were ever real or every really came about is not what is being covered by the present testimony.

JUDGE HINKES: He is referring tohis own state of mind and not necessarily the evidence that would support that state of mind.

MR. WHITE: That is right.

By Mr. Mathias:

Q Mr. Minkler, were you knowledgeable and experienced concerning the processes of production and distribution in the dairy industry in 1964 and 1965?

MR. McINERNEY: Excuse me. If that question is meant to follow up and qualify this witness with respect to the cost of private label as opposed to the cost of brand label, I object to it as being too vague to elicit any answer that might be helpful in that direction.

MR. MATHIAS: Your Honor, at this point I think the witness has testified at great extent to a great number of years of experience within the dairy industry, a good bit of this in top management positions.

I was just going to establish for the record the fact that he did have experience and knowledge concerning the processing and distribution operations of the Borden Company.

JUDGE HINKES: Well, let's get that specific information from the witness rather than a conclusionary statement from him that he is or is not knowledgeable. Let us understand from the witness just what he knows on the subject matter.

By Mr. Mathias:

Q What is your experience, sir, in the problems of productio
and distribution in the dairy industry?

MR. McINERNEY: Your Honor, I don't mean to be interrupting, really. I think the real question is what his knowledge and experience is with respect to the cost of private label vis-a-vis the cost of brand label products, and I think ---

JUDGE HINKES: I don't know if that is what Complaint Counsel is seeking. I can't very well tell him to ask about somthing that he has no interest in perhaps at this time.

MR. MATHIAS: Your Honor, Counsel for A&P will have their chance to cross-examine. Unless there is a specific objection to the question and grounds for the objection, I wish that A&P Counsel would not interrupt the interrogation.

MR. McINERNEY: The objection was as to relevancy, if Mr. Mathias is inquiring.

JUDGE HINKES: No. I will overrule the objection. The witness will answer.

MR. MATHIAS: Would the reporter read the question to the witness?

(The pending question was read by the reporter.)

THE WITNESS: I don't know how to answer it. I am not an expert, but I certainly was involved with discussions with Malone, for example, on what we were up against costwise all through these negotiations.

By Mr. Mathias:

Q And you were his superior, Mr. Minkler?

A Yes.

Q Mr. Minkler, I hand you Commission Exhibit marked for identification as 5-A and 5-B and ask you to familiarize yourself with this document, sir.

Sir, I also hand you Commission Exhibit for identification 6-A through -C and ask you to familiarize yourself with that document.

A Yes, sir.

Q Mr. Minkler, can you identify Commission Exhibit for identification 5-A and 5-B?

A It is a letter which I wrote.

Q And was this letter sent to the addresses, Mr. Archer?

A Yes.

Q Now, I note on Commission Exhibit 5-A for identification at the top of the page there are a number of notations in handwriting. Can you identify the handwriting appearing thereon, sir?

A It is my scribble.

Q Now, referring briefly to Commission Exhibit 6-A through -C, ignoring for the moment the handwritten alterations to 6-B and 6-C, does this document bear any relationship to Commission Exhibit 5-A and 5-B for identification?

A They are dated the same. I don't seem to say that they are enclosed with the letter.

Q Directing your attention to the fourth and third lines from the bottom of CX-5-A, there is reference to "this quotation." Again, in the middle of the paragraph just immediately preceeding, you have "at least to begin with, and attached are our revisions."

Would these two phrases refresh your memory in this regard, sir?

A Just a moment, please.

Q All right, sir.

A "And attached are our revisions." Yes, these went together.

Q So 6-A through -C was forwarded along with 5-A and 5-B?

A Right.

Q Do you recall who is referred to in the third paragraph where you state the three names, Jack and two Bob's? Who would these individuals be?

A Jack Pentz and Robert Comforth, who was an assistant of his, and Robert -- I can't remember his last name -- who was an accountant. I don't recall his last name.

Q And the accountant, Robert, in which office of Borden was he employed, sir?

A In the corporate headquarters. These two Bob's were Jack Pentz' assistants really, one accounting and one in general management.

Q What position with Borden did the individual by the name of Ed Brennan mentioned in this paragraph serve?

A Ed Brennan's position for the New York Metropolitan District was the same as my position for the Chicago Central District.

Q In other words, he was the President of the New York area?

A That is right.

Q There is some discussion herein of a figure of Ed Brennan's. Do you recall what the circumstances were in which you would be concerned with Ed Brennan's figures?

A I knew that A&P were also pressing Ed Brennan for a private label milk, and I wanted to talk to him about the status of his negotiations with them.

Q So in effect you were comparing notes with Mr. Brennan as to your respective dealings with A&P?

A That is right.

Q Can you recall, Mr. Minkler, the circumstances under which the handwritten notations at the top of Commission Exhibit 5-A for identification were made?

A No, I can't. I don't recall. I can read, but beyond that, I can't fill in for you.

Q Referring your attention to the very top notation which appears to be an abbreviation for December and "2" and the notation, "Harry turned these sheets in. Comment:" and then some figures, do you recall what you meant by this notation?

A You don't want me to guess.

Q No. I want you to try to testify from your memory, Mr. Minkler.

Q I don't remember.

JUDGE HINKES: Does that read "Harry turned these sheets in, comment"?

MR. MATHIAS: I don't have the original here. It might be easier to make it out.

By Mr. Mathias:

Q Would you read the top notation for us, Mr. Minkler?

A "December 2, Harry turned these sheets in." Then the next is "Comment: 3135 minus 1931." Now, that I can see ties in with something over here.

Q You are pointing now to Commission Exhibit 6-A?

A Yes.

Q Or 6-B?

A 6-B.

Q And then next the quotation ---

A "Do you really think this is good?" "I most certainly do." I have no idea what I put that down for.

Q While we are on the point, Mr. Minkler, would you read the rest of the handwritten notations at the top of this page?

A "Harry says we'll wait and see'." "He covered the Ira matter. The judgment of" -- well, I guess here are ditto marks -- "he covered the judgment of doing this in Chicago." "December 3, call from Harry. Herschel very disappointed."

Q Does the name Ira have any meaning to you, Mr. Minkler?

A Yes.

Q Who would that be?

A That would be Ira Bartels of the Midwestern Division of the A&P Tea Company.

Q Is that B-A-R-T-E-L-S?

A I think so. I think it is just one "l".

Q And who would be referred to by the name Herschel?

A Herschel Smith of the A&P Corporate Headquarters in New York.

Q And in the phrase "call from Harry," who would the Harry refer to here, sir?

A Harry Archer.

MR. MATHIAS: Your Honor, in the deposition hearings on December 1, 1971 the witness did testify further concerning the circumstances surrounding these notations and I would like at this time to call the witness' attention to transcript pages 107 and 108 of that hearing and have him read those pages to determine if they refresh his memory at this time concerning these matters.

MR. McINERNEY: Your Honor, I think that the proper way to do this is to -- I am sorry, Mr. Mathias. I don't think it is quite appropriate to be handing that to the witness at this point.

There are pages of the transcript, and I haven't read the ones to which Mr. Mathias refers, there are several places in which this witness said he had no present recollection of these events other than looking at these notes.

At other times, he did have a recollection as a result of looking at the notes, so I think what is important now is what his present memory is, and I really don't think Mr. Mathias has exhausted that process yet.

I think further that the only proper use of the transcript would be to perhaps further refresh the recollection, and if we are going to do that, I think he ought to read the transcript pages in which he said he had no present recollection as well.

In other words, I don't think it ought to be used for any purpose of impeachment. I think in fairness to the witness, he ought to be given all the page references if that is what is going to be done with the transcript.

MR. MATHIAS: Your Honor, I have no objection to Mr. Minkler reading as many pages as Mr. McInerney would care to have him read. The portion that I was calling to his attention, there had been some testimony to the effect that he did not recall the circumstances.

Then there was a point in the testimony where he found information which did refresh his memory, and he then testified as to his procedures and as to basically why these notations were made, and I was simply calling his attention to those particular pages.

However, I have no objection to him calling his attention to several of the pages.

THE WITNESS: Your Honor, may I ask you a question or explain something to you? I have a difficulty in what is reconstruction. I can see a notation and my mind wants the reconstruction from the notation, but we got involved with a lot of semantics on this when I gave the deposition.

I don't know the difference between -- I mean where the line is here, where pure memory begins and reminders. I suppose I could reconstruct something from this, but I don't remember the conversation.

JUDGE HINKES: Well, we will come to that in just a moment. First of all, I do think, Mr. Mathias, that you should state specifically what you are going to refer the witness to, what pages of the deposition you are going to refer him to.

If there is any objection by reason of, let's say, the witness' statement at that time, that he really didn't recall, we will hear it, but perhaps there will be general agreement that this was a case of a refreshing of his recollection.

Now then, if that is the case, the witness then will be asked to look at or to hear what he said previously, and if he can then recall for us now what he recalled then, we will have that as part of the record at this time.

MR. McINERNEY: Your Honor, I thought I had a preliminary objection to that which was simply this: First, I think we should establish that the witness now has no present recollection of these notes.

JUDGE HINKES: Well, that was the impression I had, but just to be sure the record contains that statement, let's ask the witness about that.

Is there anything that you can presently recall, Mr. Minkler, about the circumstances under which you made those pencilled notations and what gave rise to them?

THE WITNESS: Only that I am sure we were having ~~testimonial~~ telephone discussions about this problem that confronted us.

JUDGE HINKES: "We" being who?

THE WITNESS: I on one end, and Harry Archer and/or Jack Pentz on the other.

JUDGE HINKES: Do you recall then that you were having discussions by phone with those gentlemen at the time?

THE WITNESS: Sir, we were having discussions almost daily on this development.

JUDGE HINKES: All right. And you are sure that the notations that you made were in connection with those -

discussions, are you saying?

THE WITNESS: Yes, sir.

By Mr. Mathias:

Q Was it your practice, Mr. Minkler, when you held ~~testimonial~~ telephone discussions with the New York office to take out your correspondence and make such notations on it?

A For anything as complicated as this, I would invariably ask my secretary to bring in my last letter or whatever we are talking about, yes.

Q So this was a common practice of yours in your business procedures?

A Yes, sir.

MR. McINERNEY: Your Honor, I think in the pending question Mr. Mathias had referred to pages 107 and 108 in the transcript, and I was merely going to ask the witness in addition to reading the following page 109 of the transcript.

MR. MATHIAS: Your Honor, I withdraw the question.

JUDGE HINKES: Yes. There is no pending question at this time.

By Mr. Mathias:

Q Mr. Minkler, do you know whether or not the document marked for identification as Commission Exhibit 6-A through -C was delivered to A&P?

A I don't know it for a fact, no.

Q The notes which you have made concerning conversatins with the New York office would indicate so, would they not, sir?

MR. McINERNEY: I object to that as being argumentative.

JUDGE HINKES: I will sustain the objection. Perhaps you can rephrase your question.

By Mr. Mathias:

Q Calling your attention, Mr. Minkler, to the first handwritten notation at the top of the page, "December 2, Harry turned these sheets in," do you recall what was meant by this notation?

A Now, here I go reconstructing. I think I know what is meant by it, but I don't have -- I can't say that my memory is serving me here, but the notation is "Harry turned these sheets in," and that on it is this "3135" and a "minus 1931," and those figures are taken off of these sheets and the 1931 subtracted from the 3135 sets out a figure which is the difference between the cost, the pure cost of the milk in the container, and the price that we had indicated on these sheets that the half-gallon should be sold for. So, I am just reading what I see here.

Q When you speak of the price on these sheets, you are referring now to Commission Exhibit 6-A to -C for identification?

MR. McINERNEY: Your Honor, I move to strike this testimony. We went through this in the deposition of Mr. Minkler and the page reference which I gave before and to which Mr. Mathias referred before established that the witness testified that he had no present recollection of those facts.

Then, and on the basis of that, the testimony was not admitted. Now, I think that what -- and the witness, now I believe the state of his testimony is that he has no present recollection.

He is simply trying to be helpful by reconstructing what he thinks the facts were of these documents, and I think we ought to clarify that at this stage.

MR. MATHIAS: Your Honor, for one thing, the characterization of the record by Mr. McInerney is incorrect. This testimony was not stricken and it is clearly being admitted on page 109 of the depositional transcript.

What we have here is a matter of pass recollection recorded. This witness has testified as to his normal procedure of taking out the correspondence when he is talking to his New York office and making notations, and he recorded his conversations at that time.

He is certainly capable of interpreting his own writing at this time even though he may not have any present recollection of the actual conversation. This objection of Mr. McInerney's may go to the weight of the testimony, but it does not go to its admissibility.

The witness is certainly capable of looking at handwritten memos and notations that he made a number of years ago and refreshing his recollection as to the procedures and what he wrote down at that time.

MR. McINERNEY: If there is any question about the previous testimony, Your Honor, I would like to refer you to pages 108 and 109 of the transcript, commencing with line 17. I think Your Honor will note from that that the testimony was not considered competent.

The notations, as I understand Hearing Examiner Schrup at that time, are he may have considered business records. What I am saying is the testimony, I believe, was found not to be competent, but the notations were perhaps admissible although not admitted at that time as a business record.

JUDGE HINKES: Well, let me ask the witness. On this Exhibit 5-A where the handwriting notes two sets of figures, 3135 and 1931, do you know what those figures refer to or are you simply assuming that because they are identical to certain figures in Exhibit 6-A, they must be referring to those?

THE WITNESS: 6-A through -C, I believe, I agreed -- I don't know what the word is that went in with 5-A.

JUDGE HINKES: Yes.

THE WITNESS: And therefore, yes, I know what the figures are. They are here in front of me.

JUDGE HINKES: If those figures had not appeared on 6-A, -B or -C, would you still know what those figures meant?

THE WITNESS: Not certainly.

JUDGE HINKES: Is it possible that 3135 refers to something other than the price of a half gallon?

THE WITNESS: I can't imagine what it would be. This would be my -- if I hadn't seen this, I would have -- and I know this is a bad word -- I would have immediately assumed that that was a quotation on a half gallon of milk.

JUDGE HINKES: If you didn't have what?

THE WITNESS: If I didn't have A, B and C.

JUDGE HINKES: 6-A, -B and -C?

THE WITNESS: Yes.

JUDGE HINKES: I am going to deny the motion to strike.

MR. MATHIAS: Your Honor, the time is now ten after 12, and you stated that we were going to take luncheon breaks each day from noon to 1:30, so I think this would be an appropriate time to take that luncheon break.

JUDGE HINKES: Very well. We will recess at this time. Can we resume at 1:30?

MR. MATHIAS: Yes, sir, we can as far as we are concerned.

JUDGE HINKES: Very good. We will resume in this rom at that time.

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(Whereupon, at 12:10 p.m., a recess was taken until 1:30 p.m., this day.)

AFTERNOON SESSION

1:30 p.m.

JUDGE HINKES: You may continue Mr. Mathias.

RALPH MINKLER resumed the stand and testified further as follows:

DIRECT EXAMINATION (Continued)

By Mr. Mathias:

Q Mr. Minkler, returning your attention to Commission Exhibit for Identification 6-A through 6-C, who prepared this document, sir?

A I can only tell you that Joe Malone prepared it.

Q And was this under your direction and control, Mr. Minkler?

A Yes.

Q What is this document, sir, Commission Exhibit 6-A through 6-C?

A It is a first attempt to set forth a price for a private label but not to the customer, within the company.

Q This is A & P private label?

A Yes.

Q Returning then, Mr. Minkler, to Commission Exhibit 51 and the notation at the top, the very top of the page, "December 2. Harry turned these sheets in?"

And the notation down below "December 3 call from Harry, Herschel very disappointed," can you explain what these notations mean, sir?

A I can't elaborate on them, no, because I just don't recall.

Q In other words, sir, at the present time you have no recollection as to whether or not these documents were turned over to Herschell Smith by Harry Archer, is that correct?

A I just couldn't know positively, no, sir. Nine years ago, isn't it? I don't remember.

Q And the notations in handwriting at the top of page 5-A do not refresh your recollection as to events that occurred nine years ago?

A No.

MR. MATHIAS: Your Honor, I move that Commission Exhibit 5-A and 5-B and Commission Exhibits 6-A through C for identification be received, in evidence.

MR. MC INERNEY: No objection, your Honor.

JUDGE HINKES: Mr. White?

MR. WHITE: No objection.

JUDGE HINKES: Very well they are received.

(The documents referred to were marked Commission Exhibits 5-A, 5-B, 6-A through C were received in evidence.

By Mr. Mathias:

Q Mr. Minkler, I hand you a document which has been marked as Commission Exhibit 7-D through K for identification and ask you to familiarize yourself with this document, sir.

MR. MC INERNEY: While the witness is reading that your Honor, I wonder if it would be less confusing overall if we started with the number 1 as these documents come in. This is the first exhibit that Commission Counsel has had received in evidence and instead of having these numbers skip all over the lot it might in the long run be preferable to number them consecutively. Just a housekeeping suggestion.

MR. MATHIAS: Your Honor apparently Mr. McInerney forgets that these exhibits were for the most part testified to and discussed in prior deposition hearings approximately a year ago.

At that time -- almost two years ago now and at that time an attempt was made to allow for exhibits from A & P files and other exhibits that would measure with these particular exhibits by period of time, and to reserve those numbers for other exhibits which would not be identified by the Borden personnel.

One of those deposition witnesses, Mr. Joseph Malone is now deceased and to interpose new numbers for many of these exhibits at this time would create a great deal of confusion. It would be much better to have a vacant number of two rather than to disturb the numbering system that complaint counsel has selected.

JUDGE HINKES: Let me ask you what about your exhibits that are numbered 1, 2, 3 and 4?

MR. MATHIAS: Some of those will be offered. Some will not be, your Honor. They were reserved for documents taken from A & P files and the A & P subpoena return in the investigational stage of this and just as a number of the documents that we have marked for identification and include in our exhibit list from the Borden files.

Some of those will ultimately not be offered in this case as well. There will be vacant numbers and I apologize for that but that has been necessary in great part due to the deposition portion of this proceeding.

JUDGE HINKES: I can understand why we shouldn't have a change of numbers for exhibits so that there will be less confusion and if they have been referred to in depositions as your Exhibit 5, for example, we want to continue having the document bear the same identification.

But what disturbs me is that you are introducing these documents out of order and I wonder whether that is going to cause some confusion.

If, for example, you have an exhibit 1, is there any reason why we shouldn't be considering that before we consider No. 5?

MR. MATHIAS: Well, your Honor, the witness who would identify Commission Exhibit 1 is from Respondent A & P and will not be called for two or three weeks yet. It would

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just be very difficult to do it in this fashion. One of the problems here is that we have tried to arrange the documentation in chronological order so that it does relate fairly well to the time periods in the course of the negotiations.

For that reason a certain amount of documentation which was not in complaint counsel's hands at the time of the deposition and which was later supplied to us by Borden Counsel has been added into the exhibit list as additional letters on certain exhibit numbers so that we could keep it all in chronological order in the file and that it could be reviewed chronologically rather than in the manner in which it was put into evidence.

JUDGE HINKES: Of course, I will defer to your judgment on the order of introduction in evidence. Hopefully there is a plan and an arrangement for that purpose in your mind so I won't superimpose my judgment although I do prefer to have exhibits ordinarily received in their numbering order just so that we know if we are looking for an Exhibit No. 1, it should have come at the beginning of the case and if its the last number of sequence it should have come at the end of case and that is where we would look for it but if you have a definite plan that you are following I won't interfere with it.

MR. MC INERNEY: We can solve any problem with any of the deposition exhibits by referring to those as Malone deposition exhibit using the old number but I don't really see the necessity for doing it this way.

JUDGE HINKES: Perhaps there isn't any necessity for it but again I won't impose my judgment on what has been apparently thought of by Complaint Counsel in this respect.

THE WITNESS: I read it.

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By Mr. Mathias:

Q I also hand you Commission Exhibit 7-A to -C, Mr. Minkler, which I bleieve you will find to be the identical letter to 7-D through -F.

A All right.

Q Mr. Minkler, can you identify this document; that is, CX-7-D through K?

A D thorugh K, yes.

Q Can you tell us what it is, sir?

A It is a letter I wrote to Mr. Archer December 28, 1964.

Q Mr. Minkler, I take it that Commission Exhibit 7-A through C is a file copy of a portion of this same document, is that correct, sir?

A It is the same document, not a portion. It is the same.

Q On Commission Exhibit 7-A through C, there are certain underlinings and notations made on these first three pages, CX-7-A through C. Can you tell us, Mr. Minkler, who made those notations?

A No.

Q Referring to Commission Exhibit 7-A, can you identify the handwriting at the top of that page, sir?

A That is my handwriting. This is my handwriting.

Q That is the notation at the upper lefthand corner of Commission Exhibit for identification 7-A?

A In red pencil.

Q Now, I note that a portion of this is copies to certain individuals, some of whom are only represented by their initials. Who would HRF have been?

A Harold R. Fagerson.

Q What were his duties?

A He, at this time, was vice president of the Chicago Central District. I occasionally sent him and Warren and ~~Duggin~~ Dugan copies of my thinking on this matter even though they were not directly involved in the discussions. .

Q For the record, what was Mr. Warren's position?

A At that time he was sales manager for the Chicago operation.

Q And what was Mr. ~~Duggins~~ Dugan's position?

A He was comptroller for the District.

Q He was the successor then to Joseph Malone in this respect?

A In that respect, yes.

Q But he did not directly participate in the internal discussions and negotiations with A&P?

A No, he did not.

Q Mr. Minkler, referring to Commission Exhibit 7-B for identification, and to the fourth full paragraph appearing on that page, beginning with the "just a couple of additional points," would you read and familiarize yourself with that paragraph, sir?

A I have read it.

Q There is a statement in this paragraph reading, "We

~~followed~~ folded up in Wisconsin because of a 'no sales below cost' stipulation in the Wisconsin law. We have no such 'out' in Illinois."

Can you tell me what you are feferring to in the statement, Mr. Minkler?

A I was expressing to Harry Archer my concern based upon historical fact in Chicago and in Milwaukee on what happens if a retailer tried to establish a differential in price between an advertised brand and a private label.

During the fifties that was attempted through the Jewel stores. They brought out a label, the Dean Milk Company put it up for them, called "Yummy" and they attempted to establish a one cent differential, but their competitors didn't let them get by with it.

Immediately, the otherfood stores in the market brought their advertised brand down to the "Yummy" price and then -- I can't give you how many times this happened -- Jewel would lower the Yummy price another penny, and the next morning the advertised brands of the other chains would be down to that level, and this went on until Dean and Jewel had enough and eventually the thing worked out that Jewel had Yummy and Deal milk, the advertised brand was Dean, had both of them going out of stores at the same price. The situation stabilized after quite a period of very drastic upheaval. Now you ask me about no sales below cost.

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The same or a similar situation developed in Wisconsin until a certain level was reached, and it came up against the statute with a no sale below cost stipulation, and that ended.

Q Do you recall approximately when it occurred in Wisconsin?

A No, I can't be sure of that.

Q Was it later than the situation in Chicago?

A Later than in Chicago, yes.

JUDGE HINKES: Was the Jewel Yummy situation the Wisconsin situation that you are referring to?

THE WITNESS: No, the Jewel Yummy situation was Chicago.

JUDGE HINKES: I see.

By Mr. Mathias:

Q Why was this situation concerning you at this time, Mr. Minkler?

A It would also concern anyone in milk company management in a city like Chicago. It is a highly competitive market, and I think that the Jewel Yummy situation just clearly demonstrated the mood of this market was such that no one was going to come along with a private label and have the situation they might happen to want it.

In other words, with a differential. No one would stand for it. There isn't that much difference in milk, people would argue.

Q You are saying that there is no specific consumer preference for brand to the extent that it will bear a price differential?

A Well, answering simply, no.

Q Mr. Minkler, referring to Commission Ex hibit 7-G through I for identification, the first page of which is entitled The Borden Company, Chicago Calumet area, net selling price quotation to A&P, and shows the date in the upper righthand corner, December 28, 1964 ---

A I am sorry. I don't find anything. Oh, I guess that is a G.

Q Excuse my terrible writing.

A I beg your pardon. I thought it was a 6. Yes, proceed.

Q Who prepared this portion of this document, Mr. Minkler?

A John Malone.

Q And again this was under your distribution and control?

A Yes, sir.

Q And was this entire exhibit then forwarded to Mr. ARcher in New York?

A Yes.

Q That would be the letter plus the two enclosures, the proposal and the addendum notations?

A I don't know aboutthe addendum. I don't know, but -- it says -- I can't read that. It is smeared here. What does it say at the top? I don't recollect that.

Q It appears to read "Addenda to December 28, 1964 letter, re: A&P from RRM to HA."

A I see. I can only do what I am not supposed to do and assume it went with the letter. I don't know.

Q Mr. Minkler, referring to the first paragraph at the top of Commission Exhibit 7-C for identification, beginning with the phrase "We are still frozen to a six-day delivery," would you explain what you mean by the information in this paragraph, Mr. Minkler?

A I mean simply that we were bound by restrictions in union contract in Chicago that did not permit the kind of savings procedures which had been brought into effect in some other locations in the country. We were stuck with a six-day delivery and other places, some places could handle their wholesale delivery on either a twice a week or three times a week basis.

Q Were driver wages any higher in Chicago than in most other areas?

A Yes, they were.

Q How would they compare with, in general, drivers' wages in other parts of the country?

A I can't actually tell you except that they were substantially higher than most places in the country.

Q Referring, Mr. Minkler, to Commission Exhibit 7-G for identification, you have stated that 7-G through I was prepared by Mr. Joseph Malone under your direction and control. Just what is Commission Exhib it 7-G through I for identification?

A It is a basic projection of a change from a half-cent per point to a one-cent per point difference in price for private label as against the advertised brand.

Q Was the half-cent differential the amount involved in the earlier exhibit, Commission Exhibit 6-A thorugh C?

A I don't know about the numbers, but we saw it this morning, yes.

Q I will hand you 6-A through C again just to make sure.

A Yes, that is it.

Q So that the earlier price quotation that Mr. Malone prepared was based on a half-cent per point differential between private label and Borden label and now this quotation of December 28 was based on a full cent, is that correct?

A I would like to volunteer a point of clarification. These are not really quotations. These are submitted to Mr. Archer. This is strictly internal. We are keeping ~~many~~ him informed of what our thinking processes are and what our concerns are and this is strictly -- we are trying to bring him along with us.

I am talking to him in between and Joe and I are figuring out things and submitting them to him.

Q But this is the basic difference between these two documents entitled quotations?

A Yes, the half-cent difference, but they aren't quotations in the sense that they were actually given to a customer.

Q They were not given to a customer by you in Chicago?

A No.

JUDGE HINKES: You speak of a half-cent and one-cent per point. Would you explain that?

THE WITNESS: A point, sir, is industry nomenclature. It really is a quart. In otherwords, a half gallon then is two points and a gallon is four points and we reduce everything to points in our sales calculations.

JUDGE HINKES: I see.

By Mr. Mathias:

Q Now, I note on Commission Exhibit 7-G for identification that there are six items involved in this so-called quotation, and I am referring to the document for the source of that term. What percentage of your business with A&P at that time would these items have accounted for, approximately?

A Not just with A&P but generally speaking, pretty close to the upper 60's or 70 percent. They were our main item.

MR. MATHIAS: I move Commission Exhibit 7-A through K into evidence.

MR. McINERNEY: Your Honor, I will not object to this but I would like to explain. Both this and the previous exhibit, and I suppose it will occur again, are internal Borden documents which were never communicated to A&P and are in no way binding on A&P. I, for example, think if we were only dealing with Count 3 in this case and we had a jury present, I would be instructed that this is not applicable to A&P, was not being admitted against A&P, but I don't want to encumber these proceedings with that objection, but I think YourHonor will understand that in no way would these be admissible against us, certainly at this stage of the proceedings, with respect to Count 3, if that is all we were dealing with here.

JUDGE HINKES: At this state, that is correct. What future developments there may be remains to be seen, but the document itself is admissible and with the limitations that have already been imposed upon it by the witness.

MR. WHITE: Your Honor, for the record I would like to interject an objection to this document, this set of documents. First, generally speaking, they are irrelevant and immaterial as to Count 3 as they do not tend to prove or disprove any issue in the case, and specifically with respect to thelack of foundation in connection with CX-7-I.

I raise this objection at this time as opposed to the last exhibit because I suppose it is conceivable to interpret that portions of the last exhibit might have been communicated to A&P.

Thatis one perhaps conceivable argument, or inference may be drawn by Complaint Counsel.. But this is an internal Borden document, and I fail to see how it relates to Count 3.

dc 1

MR. MATHIAS: Your Honor, the thought processes that Borden went through in compiling its ultimate offer to A & P is, I think, material and illustrative of a number of points that are quite material and relevant to both Counts 2 and 3 in this case. I believe that in part they will, when taken as a part of the total picture, they will be illustrative and supportive of facts which will indicate that the price was not cost adjusted to A & P, and that it was unlawfully discriminatory.

These facts are also relevant to Count 3 under the charges that are stated in Count 3 of the complaint. There is some indication, as Borden counsel has just noted, that both the November 20 and later December offers were made known to A & P in New York and these facts and materials were discussed with A & P at approximately this time and at later points during the negotiations, and as such I believe they are quite material.

There will be other witnesses called who will possibly be able to shed more light on what went on between the offices in New York of both Borden and A & P. Mr. Minkler has only testified that he has no knowledge of what went on there. He did not rule out the possibility that there were some communications at that level and indeed, Commission Exhibit 5A, the notations there would strongly indicate that they were communicated to the New York office of A & P by the New York office of

Borden and that there was an expression of disappointment by A & P, so I believe that these documents as a portion of the overall negotiations and thought processes and internal workings of Borden and their internal communications is material to the charges of both Counts 2 and 3 of the complaint. Of course, the objections that Respondent's counsel have raised are matters of weight rather than admissibility. There is no question that these documents are from Borden's records, that they do show at least internal working processes of the company in connection with these negotiations, and possibly even reveal some preliminary contact between the companies at the New York level.

MR. McINERNEY: Your Honor, I can't acquiesce in that statement with respect to A & P with respect to Count 3. I think perhaps the only way we can have a clear record here is for me to object with respect to Count 3 to the admissibility of any internal Borden documents not communicated to A & P unless there is some independent basis laid for the admissibility of the documents with respect to Count 3, which there has not been to date except that Mr. Mathias has made some argument in that direction. There has been no testimony ---

JUDGE HINKES: I will overrule the objections that were raised on the representation of counsel that he expects to tie this in with future testimony. Respondents will have the opportunity to move to strike at a later date if that connection is not made.

(Commission Exhibits 7A through K, previously marked for identification, were received into evidence.)

MR. McINERNEY: Your Honor, it is very difficult in a case such as this to admit evidence subject to connection and then have it taken out later on, especially at the rate at which we are proceeding here. It will be rather confusing.

JUDGE HINKES: Well, it is six of one and half-a-dozen of the other. I don't know if it is any more difficult to have the document laid aside and then hope that somebody remembers to offer it in evidence six weeks from now when it is connected up. Either way there is a certain risk. I think this might be preferable.

MR. McINERNEY: So that I won't burden Your Honor with repetitious objections, I would like to note a continuing objection to that treatment of exhibits with respect to Count 3.

JUDGE HINKES: Very well.

By Mr. Mathias:

Q Mr. Minkler, I hand you Commission Exhibit 9 for identification and ask you to familiarize yourself with this document, sir.

A I have read it.

Q What is this document, Mr. Minkler?

A It is a letter from me to Harry Archer, dated January 22, 1965.

Q And was this letter mailed to Mr. Archer?

A Well, I can only presume that it was.

MR. MATHIAS: Your Honor, I wonder if we could take that five minute break now. I apologize for the delays at certain times in my questioning, but as you recall we didn't have too much warning to prepare for Mr. Minkler and we are doing our best to get things together as quickly as possible.

JUDGE HINKES: Very well. We'll take five minutes.

(Brief recess taken.)

JUDGE HINKES: The hearing will be in order.

MR. MATHIAS: I move Commission Exhibit 9 into evidence.

JUDGE HINKES: Is there any objection?

MR. McINERNEY: No, Your Honor.

JUDGE HINKES: Without objection, 9 is received.

(Commission Exhibit 9, previously marked for identification, was received in evidence.)

By Mr. Mathias:

Q Mr. Minkler, I hand you Commission Exhibit 8D through J for identification.

In connection with Commission Exhibits for identification 8G through J, counsel for respondent Borden has provided Complaint Counsel with a typewritten description of those notes.

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It might assist you in interpreting that document.

MR. McINERNEY: I am not sure we received that. Do you have an extra copy of it?

(Document handed to Counsel.)

MR. McINERNEY: Thank you.

MR. WHITE: We provided you with this?

MR. McINERNEY: No. We had not received in previously.

By Mr. Mathias:

Q Have you familiarized yourself with this document now, sir?

A I don't remember it at all. I recognize the handwriting on the worksheet.

Q Whose handwriting is it, sir.

A Joseph Malone's.

Q That would be for the entire exhibit?

A Yes. The entire exhibit.

Q I now hand you Commission Exhibit 12 A and B for identification and ask you to familiarize yourself with that document, sir.

I also hand you Commission Exhibit 14 A through E for identification.

Can you identifiy Commission Exhibits 12 A and B, sir?

A Yes, a letter from me to Jack Pentz, dated February 9, 1965.

Q And I notice a signature over the signature block appears to be Ralph?

A That is right. It is mine.

Q In your handwriting. And on the front page of Commission Exhibit 12 A at the top there is a notation A & P, Chicago. Is that in your handwriting too, sir?

A No.

Q What is Commission Exhibit 14 A through E?

A Well, it is another tentative looking at what we might quote, what we have been doing here since back in December. Going through an evolution.

Q Did Commission Exhibit 14 A through E bear any relationship to Commission Exhibit 12 A and B, your letter to Mr. Pentz?

A They are dated the same and it says in the letter, third paragraph, "Attached is a copy of the approach Tarr is going to make," so they went together I assume.

Q Did Mr. Tarr in fact in February, 1965, deliver a price quotation to A & P in the Chicago area?

A I don't remember. I don't believe so.

Q Referring to Commission Exhibit 12 A, the second paragraph starting, "Just this morning", would you read through that paragraph and see if it refreshes your memory concerning events in February of 1965?

A I don't know the significance of it. I do not recall what prompted the statement, what it is about.

Q Do you recall, Mr. Minkler, just when A & P in Chicago did ask you for a quotation on the supply of private label milk to their Chicago unit?

A Well, I don't understand your question. I mean it began back before this but -- well, I don't understand your question.

Q When did A & P ask you for actual prices?

A It was in Spring of this year.

Q 1965, that is?

A Yes, sometime after this that the delaying action had to come to an end.

Q Who did A & P approach for actual prices? Did they contact you, sir?

A No. Gordon Tarr.

Q And under what circumstances?

A I don't recall exactly except to say that he came in one day after making a call and said we have got to put together a solid quotation for A & P.

Q And what did you do then, sir?

A More of the same. Sweat it out.

Q Did you in fact put together a quotation for A & P?

A Yes.

Q And what area was covered by your first offer to A & P?

A I want to know what you have in mind as far as first offer is concerned. If we are talking about an offer that would yield them a figure which you have $410,000, it covered the whole area that we served of the Midwestern A & P Division. I don't know ---

Q Well when Mr. Tarr first returned to you in early 1965 and stated that you had to stop delaying and provide A & P with some actual figures, what did you prepare at that time? Did you prepare an offer that would cover all of the stores of the Chicago unit?

A I don't recall.

Q Now I note that CX 14 A through E and the earlier documents you have identified which have referred to themselves as quotations have all been for the Chicago-Calumet area. Just what area would be encompassed within the Chicago-Calumet area?

A Well that would be the main body of their business. That is the area of Midwestern A & P Division that had the most stores. This was the metropolitan area.

Q The metropolitan area of Chicago, and wuld Calumet be the Northwestern Indiana portion of that?

A That is right.

Q Now, Mr. Minkler, referring again to Commission Exhibit 14 A through E, and in particular Commission Exhibit 14 E, I see that this quotation in contrast to the two prior documents to which we have referred has five additional items included thereon, chocolate milk, quarts, buttermilk, half gallons, buttermilk, quarts, fortified skim quarts, and whipping cream, half pints.

What were the circumstances that prompted Borden to include five additional items in this document?

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A All I can tell you is that I remember Gordon Tarr coming back from one of his trips and saying that Elmer was not going to be satisfied with five items only, that he wanted the whole line covered.

Q Was this in fact with these five additional items the whole line?

A Practically, yes.

Q Mr. Minkler, returning to Commission Exhibit 12 A, the first sentence of the last paragraph on that page reads, "We decided after much additional soul-searching and mathematics that we would have to go back at Schmidt with something of an improvement over what Herschel Smith had turned down."

Now what do you mean by this statement, Mr. Minkler?

A I can't at this stage give you any details. I don't remember what he turned down. I never saw him.

Q Mr. Smith was in New York, is that correct?

A Herschel Smith was in New York.

Q And your office did not deal directly with Mr. Smith?

A I had no contact whatever with him.

JUDGE HINKES: What kind of an improvement are you talking about there?

THE WITNESS: Clearly, if you follow these internal things that we were writing about, that is all you have to go on, but there was conversation all the time between me and my superiors in New York. We were getting the message as we talked all the time that we weren't going far enough to insure the continuation of this business.

JUDGE HINKES: In price?

THE WITNESS: In price, and so each one of these that Mr. Mathias has brought out here have been another step towards what you are going to get to sooner or later.

By Mr. Mathias:

Q In Commission Exhibit 12 B, the first full paragraph therein, there is reference to a reduction per point of point 0127.

A Right.

Q This would compare to the previous reductions that you had referred to of a half-cent and a cent?

A That is right. That is just the point I was making.

Q In the very top line on Commission Exhibit 12 B, which is a continuation of the sentence on the prior page, Commission Exhibit 12 A, it is stated, "We have decided we must come through through with it" bottom line".

What do you mean by the bottom line, Mr. Minkler?

A The very best we could do, the lowest price we could give.

MR. MATHIAS: Your Honor, the witness recollection appears to be a little hazy on the point as to this particular exhibit and the circumstances surrounding it. In his testimony in deposition on December 1, 1971, in Chicago almost two years ago, the witness did testify to the effect that this document, that is Commission Exhibit 14, with subparts 14 A through E, was delivered to Mr. Schmidt of A & P by Mr. Tarr.

Now I would like to have Mr. Minkler read through pages ---

MR. McINERNEY: Your Honor, I object to the summarization of the prior testimony. If there is something which Mr. Mathias wishes to refresh the witness's recollection on after he has exhausted it by other means, then perhaps it is appropriate to show it to him. I wish we had received a page reference so we could see what it is he is referring to and give me an opportunity to object if it is objectionable.

MR. MATHIAS: I am referring to transcript pages 138 through 146 of the December 1 transcript, and I would like to hand this document to Mr. Minkler and have him read through his prior testimony to see if it refreshes his recollection.

MR. McINERNEY: May we have just a minute?

JUDGE HINKES: Yes.

MR. McINERNEY: We will not object to showing it to the witness.

MR. WHITE: I would suggest Mr. Mathias might start on page 137 and I think he can get a thorough understanding of what was going on exactly.

MR. MATHIAS: I would also like to note that I am handing Mr. Minkler along with the transcript a sheet of corrections initialled by Mr. Minkler which he personally made in the presence of counsel for each of the parties when he reviewed the depositional testimony at a later date.

JUDGE HINKES: Very well.

THE WITNESS: I think I was a much better witness then than I am today. I just don't recall.

By Mr. Mathias:

Q Does the reading of these pages of the transcript refresh your memory concerning these two documents?

A I am not remembering too well at all the circumstances surrounding the submission of this by Tarr to Schmidt.

Q That is Commission Exhibit 14 A through E.

A Yes.

Q At the time you testified in December of 1971 did you have a clearer recollection of events than had occurred in 1964 and 1965 than you do today, sir?

A Well, you are handing me this. I was having trouble recalling just the circumstances surrounding it. I guess that is all I can tell you. I read this and recognized the logic of it.

Q In other words you read the transcript and you recognize the logic, but you still have no present recollection as to the events related in the transcript?

A Not to this particular one, no.

MR. MATHIAS: Your Honor, Complaint Counsel moves that transcript pages 137 through 146 of the December 1, 1971, deposition be as corrected by Mr. Minkler immediately subsequent to the taking of the deposition, be received in evidence in this proceeding.

MR. McINERNEY: I object to that, Your Honor. I could point to other pages of the transcript which are inconsistent with certain testimony that the witness gave, and I won't have an opportunity to point that out until later on, but I don't think that we can have both the deposition and the testimony.

Secondly, I have just read it very quickly while the witness was being examined and I don't think it quite says what Mr. Mathias is implying it says, and thirdly, I think we are taking up an awful lot of Mr. Minkler's time as to something to which there is really no dispute. The prices to which this exhibit refers were at some point in time submitted to A & P. Now whether it happened on February 9 or not I submit is wholly immaterial.

MR. MATHIAS: Your Honor, if A & P Counsel is willing to stipulate that Commission Exhibit 14-A through Z was submitted to A & P by Borden in the Chicago area, to Mr. Schmidt by Mr. Tarr sometime in the spring of 1965, we would have no reason to ---

MR. McINERNEY: Your Honor, I don't know whether this particular Exhibit was submitted. I know these prices were submitted, and I really don't see what the point is of sticking to this particular exhibit. There isn't any dispute about the numbers having been submitted to A & P.

In fact, I think they were submitted twice, the second time a little later on in connection with an overall bid, covering not just the Chicago area, but other areas as well.

MR. MATHIAS: Your Honor, in the course of the proof of our case, we have to set up a certain course of events and negotiations in this matter, and I believe that we are entitled to do so. The testimony of Mr. Minkler, at the earlier deposition hearing, speaks for itself.

I am not going to try to categorize it, but as the witness has noted, it is at variance with his present memory. He, at this time, has no recollection of those events. In 1971, when he testified he did recall the events, and he did testify as to the dates and events surrounding these two documents, Commission Exhibits 12 and 14, with subparts.

The purpose of a deposition to preserve testimony is two-fold. If the witness is unavailable to testify at the later date, then the deposition, of course, may be used in place of his testimony. In the event that his memory has lapsed as to certain of those events, if they are material and relevant to the issues of the case, well, such portions of that transcript as relate to those documents and events are admissible into evidence in lieu of the present testimony which is no longer lost, just as if the witness were not available.

JUDGE HINKES: Is it critical to your case that you have the date and the means by which this was communicated from Borden to A & P?

MR. MATHIAS: It is important to our case, Judge Hinkes. The events surrounding the forwarding of these various documents, and who received them, all build up into the total picture which we would indicate and which we maintain indicates that the A & P personnel involved knew, or should have known, that the price they received was unlawfully discriminatory.

The course of negotiations herein were primarily between Mr. Tarr and Mr. Schmidt. Mr. Schmidt of A & P received most of this documentation, and we do have to set up a course of event s to show exactly how this negotiation developed and how certain information was conveyed to Respondent A & P.

MR. McINERNEY: Both Mr. Tarr and Mr. Schmidt, of course, are scheduled to testify.

JUDGE HINKES: Yes, but whether ornot they will testify remains to be seen.

MR. McINERNEY: I don't think, Your Honor, that there is any precedent for putting a part of deposition in in this fashion.

JUDGE HINKES: Is your objection, then, to the receipt of part of it, and that you would withdraw your objection if all of it is received?

MR. McINERNEY: No.

JUDGE HINKES: What is your objection?

MR. McINERNEY: My objection is that the purpose of showing this to the witness if for refreshing the recollection, and not for purposes of impeachment, and when a document fails to refhesh a witness' recollection, it does not thereby become admissible in whole or in part.

JUDGE HINKES: This is not a mere document. This is a statement under oath given by this witness in the presence of Counsel, and corrected by him, as a matter of fact, to insure its accuracy. I don't consider this as just another document.

Under all of the circumstances, I am going to overrule the objection, and I am going to receive these pages in evidence as corrected, and once again, would you state the pages?

MR. MATHIAS: That was TR-137 through 146, Your Honor, as corrected.

Your Honor, I am not quite sure of the procedure we should follow here. I have been requested by the reporter, should we give a Court Exhibit number to this, or should we just have the reporter type in the corrected pages from the official copy of the transcript?

JUDGE HINKES: I think that we shouldn't ask the typist to type this into the transcript. I think copies of those pages should be made and offered as an Exhibit which it is now being received as.

MR. McINERNEY: In view of Your Honor's ruling, I think it is imperative that, at this stage of the proceeding, you also receive portions of the transcript inconsistent with that portion of the transcript.

JUDGE HINKES: What you are sayingin effect, is you would like to have your case come in at this time where it is particularly relevant.

MR. McINERNEY: Not entirely, Your Honor, and I don't mean to make a big thing of this, but I think there is precedent for not waiting some time between the time of some part of the deposition being offered and another part of the deposition being offered.

In other words that there should be a correction immediately if it is to be made. I have in mind only reading

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from one question and answer with respect to this, and it has nothing to do with the point that Mr. Mathias is trying to make, which I consider to be wholly immaterial, but it does correct an impression given in a prior answer and it will only take me a minute to give it to you just so that we have the two together at the same point of the record.

JUDGE HINKES: Very well. If it is short, you can read it into the record.

MR. McINERNEY: It is very short. It has to do with Mr. Mathias's previous question, which is also incorporated into this portion of the transcript he is now offering with respect to what was meant by the bottom line in this particular place.

At page 188-F, the transcript, Mr. Mathias' questioning says, "Did you think this was the best offer you could make at this point?" And Mr. Minkler answers, "I don't know, I don't think so. It was an offer that we developed over a period of time with lots of sweat and it seemed to us to give them good advantage on private label, and we hoped we could sell it."

I simply want to clarify that point because it has to do with that portion of what he is putting in now. In other words, it is intermingled with what he is putting in now. I think that also shows the problem, Your Honor, with admitting portions of a deposition.

MR. MATHIAS: Your Honor, I might note that the language which Mr. McINERNEY has cited relates to a different exhibit. At that point in the questioning, we are discussing Commission Exhibit 43-A through C, memo, A & P, dated 8/18/65.

MR. McINERNEY: But discussing the same prices, Mr. Mathias.

MR. MATHIAS: In view of this, Your Honor, I would move that Mr. McInerney's motion be denied and that if he has points that were covered in cross-examination in the transcript which he can cover by cross-examination now, that he do so at that time.

MR. McINERNEY: This is your direct examination, Mr. Mathias, not by cross-examination.

JUDGE HINKES: In any event, the solution seems to be relatively simple. I have received in evidence pages 137 through 146 of the deposition. The record now contains --

MR. WHITE: In total, Your Honor, even though parts of it have nothing to do with this?

JUDGE HINKES: In total. I am not going to split pages. I am going to accept the entire page as offered. This is the very least I can do, short of taking the whole deposition as has been suggested.

MR. WHITE: I was suggesting only taking that that relates to the exhibit about which he was inquiring. There is interspersed all sorts ofthings.

JUDGE HINKES: That is true, but it is going to be more difficult to excise portions of a page. I think we needn't worry about irrelevant material inasmuch as that is not being offered for the purpose of proving irrelevancies, and we can ignore them.

MR. WHITE: I see. It is offered just as it relates to Exhibit 12 and 14, is that my understanding?

JUDGE HINKES: Twelve and 14, that is right, and insofar as it is irrelevant to those exhibits, we will all ignore those portions of the page. Now then, the record also contains a statement from Mr. McInerney reading from another portion of that same transcript, which it is argued casts a new light upon the first pages of that transcript that have been received in evidence.

This is a matter of argument for Counsel. Perhaps it does, and perhaps it doesn't. Perhaps it refers to the same exhibits, and perhaps it doesn't. Perhaps it refers to the same situation though its different exhibits. I don't know, and I will be guided pretty much by the argument that is advanced by Counsel.

I don't think we have to dwell upon it any longer. You may continue, Mr. Mathias.

MR. MATHIAS: Your Honor, I take it that you would want us to make this our exhibit, is that correct, or a Court Exhibit?

JUDGE HINKES: I think you should make it your exhibit. It is your offer, and the objection to your offer has been overruled.

MR. MATHIAS: It would then be Commission Exhibit CX-259-A through M, including the certificate with the corrections.

XXX (The document referred to was marked Commission Exhibit CX-259-A through M, including the certificate with the corrections, for identification.)

JUDGE HINKES: 259-A through M is received.

XXXX (The document heretofore marked for identification as Commission Exhibit CX-259-A through M, including the certificate with the corrections, for identification was received in evidence.)

MR. MATHIAS: Your Honor, on the basis of the testimony in Commission Exhibit 259-A through M, I would offer Commission Exhibit 12-A and B and Commission Exhibit 14-A through E into evidence.

MR. McINERNEY: I object to that as any basis for the admission of any evidence, Your Honor.

JUDGE HINKES: I am agraid I didn't follow you, Mr. McInerney.

MR. McINERNEY: He is offering this on the basis of the deposition testimony which I respectfully submit was improperly submitted, and I, therefore object to the offer.

JUDGE HINKES: Consistent with my ruling, I must receive these documents in evidence, and the objection is overruled.

XXX (Commission Exhibit 12-A and B and Commission Exhibit 14-A through E were received in evidence.)

By Mr.Mathias:

Q Mr. Minkler, I show you Commission Exhibit 13-A through N for identification and ask you to briefly famialiarize yourself with this document, sir.

JUDGE HINKES: Off the record.

(Discussion off the record.)

JUDGE HINKES: On the record.

Mr. Mathias, you have not offered your exhibit 8, is that correct?

MR. MATHIAS: No, Your Honor, I have not offered it yet.

JUDGE HINKES: Very well.

By Mr. Mathias:

Q Mr. Minkler, Can you identify handwriting on Commission Exhibit 13-A through N for identification?

A Yes.

Q Whose handwriting is it, sir?

A It is Joe Malone's handwriting.

Q Are you familiar with this document?

A No, I would have to study it. This would take me some time to study. There are a lot of mathematics and calculations here, the background for price quotation.

Q But you are not personally familiar with the document?

A No.

Q All right.

Mr. Minkler, I show you Commission Exhibit 16-A and B for identification and ask you to familiarize yourself with this document. ARe you familiar with this document, sir?

A No, I am not.

Q Are you familiar with the handwriting thereon?

A I don't know whose handwriting it is.

Q During the period of the negotiations, I believe you previously testified that you were in very frequent communication with the New York office, isn't that correct, sir?

A Yes.

Q And now, Mr. Minkler, I hand you Commission Exhibit 17-A through U for identification.

A As far as handwriting is concerned, you would have to go through them a sheet at a time, I guess because it isn't all the same handwriting.

That is Joe Malone's.

Q You are referring to 17-A?

A Yes, I don't know whose this is. It is not the same writing.

Q That is 17-B.

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A This likewise is somebody else's.

Q 17-C, that is?

A Yes. Somebody probably had done some work for him. This is Mr. Malone.

Q 17-D was prepared by Mr. Malone.

A This is Malone, 17-E.

Q Maybe I can shorten the situation. Some of these pages have been prepared by Mr. Malone and others have not, is that correct?

A Mos of them are Malone.

Q I hand you Commission Exhibit 17-V. Can you identify handwriting on that page?

A This is Mr. Malone.

Q Mr. Minkler, I hand you Commission Exhibit 18-A through P for identification and ask you to familiarize yourself with this document, sir.

Your Honor, it has been an hour since the last break. In view of the fact that we may be going a little late this afternnon, possibly we should take another break at this time to give the witness a chance to take a breath.

JUDGE HINKES: Sure. Let's take five minutes now.

XXXX (A brief recess was taken.)

JUDGE HINKES: You may continue.

By Mr. Mathias:

Q Are you familiar with Commission Exhibit for identification

18-A through P?

A Yes.

Q That is this document, sir?

A This document is a quotation covering the additional areas that were not in the February 9 tabulation. That was Chicago Calumet area, and this is for areas Nos. 2, 3, 4, 5 and 6.

Q Are these areas of the Borden Company of the A & P Company, sir?

A These are areas -- well just let me read one here. These are the areas where we had the Borden Company, different raw milk costs, so they are Borden areas.

Q The stores involved in each of these areas were A & P stores of the A & P Chicago unit?

A That is right.

Q But they were in other milk marketing orders from that which governed your Chicago-Calumet prices?

A Yes, they were different.

Q And was this offer tendered to A & P, Mr. Minkler?

A I know it was discussed with A & P by Gordon Tarr. I wasn't there.

Q Did Mr. Tarr report to you that he had delivered this price quotation to A & P?

A I am sure he did. I don't recall any specific part of that conversation.

Q Is it your present recollection that this document was

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tendered to A & P?

A Yes.

Q So as I understand your previous statement now, Mr. Minkler, area No. 1, the Chicago-Calumet area, was not a part of this offer, is that correct?

A It had already been made.

Q And the previous offer for that area was still, in effect, in your dealings with A & P?

A Yes.

Q Mr. Minkler, I call your attention to Commission Exhibit 18-O for identification.

A Yes, I have it in front of me.

Q In the top third of the page, there are various figures, and in the two righthand columns in the line marked "gallon," there are certain figures in brackets. What did those brackets denote, sir?

A A loss. This sheet is a way of pointing out to A & P that with this quotation, the Borden Company is really extending itself, that this is a composite page here covering these several areas and looking down at the bottom figures, it indicated that we had a gross profit per quart for the quart items, of one cent and two mills, and for the half gallon of only a mill, and for the gallon, we were in brackets. In other words, we weren't coming out at the price that we quoted, but that on a composite basis -- and I don't seem to have this here -- but we were barely ahead of the game.

MR. McINERNEY: Your Honor, I didn't want to interrupt the witness' answer, but I think there has been no basis laid that this witness is qualified to testify that these were the actual costs and profits. I think what is happening is that he is reading from the Exhibit what the Exhibit was intended to indicate to A & P.

THE WITNESS: I do not imply that we had made a cost motion study to get to this, no, but based upon raw milk costs, container costs, production expense, this is how tight this deal was for us.

JUDGE HINKES: How do you know that these are the correct figures?

By Mr. Mathias:

Q Did you participate in the preparation of this document, Mr. Minkler?

A No, Joe Malone made it.

Q And it was under your direction and control?

A That is right.

Q And you were in constant communication with Mr. Malone on these problems?

A Oh, sure, yes.

MR. McINERNEY: I don't think that that establishes though that the witness is competent to testify that these are actual costs and profits.

MR. MATHIAS: Your Honor, what the witness has testified to is that this is what the sheet indicates and that it was prepared to indicate this to A & P. He hasn't testified as a cost accountant. He has testified as the individual who was in control of this situation and under whose direction and control this document was prepared for submission to A & P, and I think there is ample justification on the record for taking his testimony as to what this document was intended to convey to A & P.

JUDGE HINKES: Yes, I must overrule the objection. The witness himself has testified as to the use of this particular document and what it purports to represent based upon his knowledge of what his subordinate prepared.

MR. McINERNEY: Your Honor, if I may, the witness had started to answer previously, and I don't think we have the full import of his testimony. I was going to point out that I don't think , either on this occasion or on the prior occasion, he ever purported to have any personal knowledge with respect to these figures and indeed, at page 359 of his deposition transcript, he testified that this particular document and these particular figures were a sales tool to show A & P that it was getting a good deal, not that these were the actual prices or cost.

JUDGE HINKES: That is my point. Whether actual or not actual, this is the paper that was used in the negotiations and to that extent, it is admissible.

MR. McINERNEY: I am not quarreling with that, Your Honor, I just thought it appropriate to clarify, at this point, Mr. Minkler ---

MR. MATHIAS: Your Honor, I would object to clarification statements fromRespondent's Counsel; when he has a legitimate objection that is fine, but his so-called clarifications can wait for cross-examination. He is just prolonging and extending the examination of this witness.

MR. McINERNEY: Then, I will put it in the form of an objection, Your Honor. I do not object to the admissibility of the document, but I do object to any testimony which is simply the witness' reading from the document without any present recollection or, indeed any prior knowledge with respect to the actual facts as to profits and costs.

JUDGE HINKES: The witness, as I understand it, was explaining the figures that appear on here, and inasmuch as it was prepared under his supervision, I think he is qualified to do so. I shall overrule the objection.

There is, however, some confusion in my mind about the figures you referred to, Mr. Munkler. In the upper third of this page 180, unless I have the wrong page, there is a column entitled "Borden Gross Profits Per Quart."

THE WITNESS: Yes, sir.

JUDGE HINKES: And it shows something like 1-2/10,

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22/100's make that, cents per quart profit, and then you said on half gallons, it was about a mill, but the figure here is 61/100's of a cent.

THE WITNSSS: Let me see.

MR. McINERNEY: I think, Your Honor, he was reading from the bottom figure on that column, the bottom line "Borden's Gross Profit Per Unit."

MR. MATHIAS: And also, Your Honor, at the top, if you will notice his "Borden Gross Profit Per Quart," so under each of these units, quart, half-gallon and gallon, he has broken them down into quarts, so the half gallon would be on a quart basis over in "Borden Gross Profit Per Quart," rather than on the whole half-gallon basis.

JUDGE HINKES: So in effect, what you should do is multiply that figure of 6/10's of a mill by 2, then.

MR. WHITE: That is right.

JUDGE HINKES: To reach the half-gallon?

THE WITNESS: That is right.

MR. WHITE: And that correspondes with .0011 down below, which is more specific.

JUDGE HINKES: And that figure should presumably be multiplied by 4?

MR. WHITE: No, that is a half-gallon, Your Honor.

JUDGE HINKES: No, I mean the 0011 that appears for gallon in the "Gross Profit Per Quarts" column.

MR. WHITE: I was referring to the 0011 at the bottom of the page, Your Honor, per half-gallon.

JUDGE HINKES: Yes.

MR. WHITE: But yes, that is right, if you are taking the ---

JUDGE HINKES: Yes, I see where it has been multiplied, in effect, by 4.

MR. WHITE: Yes, sir.

JUDGE HINKES: You may continue, Mr. Mathias.

MR. MATHIAS: Your Honor, I offer Commission Exhibit 18-A through P in evidence.

MR. McINERNEY: No objection, Your Honor.

JUDGE HINKES: Without objection, it is received.

XXXXX (Commission Exhibit 18-A through P was received in evidence.)

By Mr. Mathias:

Q Mr. Minkler, I hand you Commission Exhibit 19-A through H for identification and ask you to familiarize yourself with this document, sir.

Do you know who prepared this memorandum, Mr. Munkler?

A Yes.

Q Who prepared it, sir?

A Joe Malone.

Q And was it submitted to you?

A Yes, it was.

MR. McINERNEY: Is the question was it submitted to the witness at or about the date it bears?

MR. MATHIAS: I didn't ask that particular question.

MR. McINERNEY: It was submitted to him just now.

By Mr. Mathias:

Q Was this document, Commission Exhibit 19-A through H, submitted to you by Joseph Malone on or about the date appearing thereon?

A I can't answer that for sure.

Q Was it submitted to you by Mr. Malone, first of all?

A I certainly believe so, but I don't remember the exact circumstances of his handing it to me, no.

Q You do not recall the exact date or the circumstances under which you did receive it?

A No.

Q Mr. Minkler, Was it Mr. Malone's practice to prepare and submit to you memoranda dealing with the course of the negotiations with A & P in this case?

A No, but it was characteristic of Mr. Malone to always write up,for his own record, a resume of any discussion that he had of importance, and sometimes I saw them, sometimes I didn't. They were strictly for his own record.

Q This would be in any matter, not only the A & P matter?

A This would be on any matter, yes, sir.

Q And this was his normal business procedure?

A He did it regularly.

Q And on this, and on some other occasions, these memoranda would be submitted to you?

A That is right.

MR. MATHIAS: I offer CX-19-A through H into evidence.

MR. McINERNEY: I object to that, Your Honor. May I ask a question or two on voir dire?

JUDGE HINKES: Certainly.

XXXXX VOIR DIRE

By Mr. McInerney:

Q Mr. Minkler, was Mr. Malone instructed by you or by anybody else ~~important~~ in Braden who was his superior, as far as you know, to prepare these memoranda?

A No, he was not.

Q And have you, in the course of the previous investigations in this matter, been shown so-called Malone memoranda, such as the one you now have in front of you?

A I don't believe so.

Q You think this is the first time you have seen this one in the course of these various hearings, and so on?

A In the hearings, yes, but I believe this is the first time I have ever seen it in a hearing or giving a deposition.

Q How about in preparation for depositions or for hearings? Have you seen documents such as this?

A I don't recall; I do not.

Q I am wondering, Mr. Minkler, whether you can tell us that you are seeing this now for the first time since 1965, and that you recall having received it back in 1965, somewhere close to the time involved.

A When Mr. Mathias handed me this, I very quickly noted some sentences in here that I recollected reading a long time ago, then I didn't go on and read all of it because he said it wasn't necessary. I don't remember seeing it since 1965.

Q But you can identify that as the year you saw it? What I am wondering, Mr. Minkler, without going into it too elaborately, in view of the fact that you have testified previously, and you have prepared for that testimony, whether you might not have seen this in preparation for that testimony, rather than at or about the time that it is dated?

A I can't answer that. I don't know.

Q Have you been shown at various times some handwritten notes from Mr. Malone?

A I have certainly been shown lots of handwritten computations. No, not to my recollection, any other writeup like this.

Q Nothing that was actually written out in script?

A No.

MR. McINERNEY: Your Honor, I think that in view of the fact that he was not instructed to do it as part of his normal duties, and it was a completely voluntary act on Mr.

Malone's part, that this is not an ordinary course of business record.

MR. WHITE: Your Honor, I would, at this time, interpsoe an objection to it on the grounds that there is insufficient foundation. Mr. Malone's testimony was taken by deposition and is available with respect to this matter. It isn't simply a question of whether a man prepared it.

It is what does it purport to be, and is it what it purports to be,a matter on which this witness is not qualified, and the authorization thereof was and this is an important memorandum.

JUDGE HINKES: It certainly doesn't appear to be qualified as a record kept in the ordinary course of business.

MR. MATHIAS: Your Honor, I would like you to forego a ruling on that aspect of it, if we are coming down to this consideration, on the grounds that there is quite a bit of law in support of the fact that this is a business record, along with a number of other memoranda that Mr. Malone prepared.

It is true, however, that Mr. Malone has testified at great length in his depositions as to his normal business procedures and to this and a number of other memoranda which he prepared in connection with this negotiation, as well as to his working habits in connection with any matter, as Mr. Minkler has testified,to keep memoranda for his files and to rely upon them.

There is a great deal of law on the subject, and I would prefer to wait and brief it all to you at the same time, and I will withdraw my offer at this point and offer them in connection with Mr. Malone's testimony at a later date.

JUDGE HINKES: Very well.

By Mr. Mathias:

Q Mr. Minkler, I hand you Commission Exhibit 20-A to Q, and again I just want you to familiarize yourself with the handwriting in this document.

A Yes, sir.

Q Can you identify the handwriting on this document, sir?

A Yes, I can.

Q Whose handwriting is it?

A Joseph Malone's.

Q Who prepared the underlying cost studies and the underlying tabulations in connection with your various offers to A & P and your quotations to A & P?

MR. McINERNEY: Objection, Your Honor. There has been no testimony that there was a cost study. As a matter of fact, I think their witness testified that there was no formal cost study with respect to these matters.

JUDGE HINKES: You had better ascertain that from the witness.

By Mr. Mathias:

Q In the course of preparing offers for internal

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consideration, and for presentation to A & P, were various cost computations and tabulations made in support of these considerations?

A Not in the sense of a formal cost time and motion study, but in developing these figures, naturally you develop them on the basis of the raw milk cost for each area, the container cost for each item, the ~~proceeding~~ processing cost per point, and the delivery cost per point, and that was the basic cost figure that was used in setting forth the difference between the quotation we gave and the cost of the product.

Q So there was constant computation of these elements of cost to determine where you stood in the negotiations, is that correct, sir?

A Yes.

Q Who did this type of cost computation for you, sir?

A Joe Malone.

Q And he did all this type of work in connection with the A & P negotiations?

A All of it.

Q How many years had Borden been the supplier to A & P in 1964-1965?

MR. WHITE: In the Chicago area?

MR. NATHIAS: In the Chicago area. Excuse me.

THE WITNESS: Let's see. 1964 or 1965. It went back to the early or middle fifties. I can't tell you exactly how many years, a long period of time.

By Mr. Mathias:

Q Mr. Minkler, I hand you Commission Exhibit 21-A through U for identification and ask you to familiarize yourself with this document, sir.

Mr. Minkler, are you familiar with Commission Exhibit 21-A through U?

A I have just been refreshing my memory on it, yes. It is another quotation.

Q What is this document, sir?

A It is a quotation, another quotation submitted to A & P.

Q And was this submitted to A & P on or about the date shown on the various pages revised July 26, 1965?

A I am sure it was.

Q What was the purpose of this revised quotation, sir?

A Again to bring out all the details pertaining to areas 2, 3, 4, 5, and 6, and it is again a sales tool, this last schedule or the last sheet, used in an effort to try to sell the customer on the tightness of our quotation.

MR. McINERNEY: May the record note that the witness is referring to 21-U as the last sheet.

THE WITNESS: That is right.

By Mr. Mathias:

Q 21-A through T, I take it, sir, are the particulars of the quotation you made to A & P at that time?

A That is right.

Q And this again did not relate to area No. 1, the Chicago-Calumet area, is that right, sir?

A That is right.

Q And I take it then, that your earlier offer, the February offer, was still in effect for that area?

A I believe that is right.

JUDGE HINKES: Was this also communicated to A & P?

THE WITNESS: Yes.

JUDGE HINKES: By whom?

THE WITNESS: ByGordon Tarr.

MR. MATHIAS: I will offer Commission Exhibit 21-A through U into evidence.

MR. McINERNEY: No objection, Your Honor.

JUDGE HINKES: It is received.

XXXXXX (Commission Exhibit 21-A through U was received in evidence.)

By Mr. Mathias:

Q Mr. Minkler, I hand you Commission Exhibit 23-A through I for identification, 24-A through F for identification, 25-A 26, 27 and 29 for identification and ask you to familiarize yourself with these documents, sir.

I would like to add to that list 24-G, which I accidently omitted.

Mr. Minkler, can you identify these various documents?

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A To a certain extent, yes. They are a study comparing New York cost of milk with Chicago's.

Q Under what circumstance was this study prepared?

A I can't recall the exact manner in which it came up, but I will give it to you broadly. Ira Bartels stated, I believe, to Joe Malone, though it may have been to Gordon Tarr, this was sometime after he had presumably -- excuse me, I have to presume a little -- looked over these last quotations that you just showed me.

Q That is Commission Exhibit 21 that was just handed to you.

A Right, and the thought was expressed for one reason or another that he would certainly like to see a comparison between what we had been quoting and what was in effect in New York City, and I think this was about the last of July or very early in August.

At any rate, Joe Malone went to New York and spent four or five days and put all of this together.

Q And what happened then?

A Then -- and again I am hazy as to a lot of specific detail, but, in effect, this is what happened.

MR. McINERNEY: Excuse me, Mr. Munkler. I didn't want to interrupt you before, but I think no one wants you to speculate.

THE WITNESS: Wait a minute. I can tell you what happened in this respect. Malone went to see Bartels to discuss this and explain it to him, and by that time, Bartels just took the attitude well, I am not interested in that. Yes, all right, I may have asked for it, but that isn't what I am interested in.

I am interested in the best price I can get for a private label milk. This is clearly my recollection. I can't give you specific details as to times or all of the conversation, but that is what it amounted to.

By Mr. Mathias:

Q Mr. Minkler, you were present, were you not, at the delivery of this document to Mr. Bartels?

A It is my recollection that both Malone and I went up there and were greatly surprised at his reaction. He didn't want it any more.

MR. McINERNEY: May we know whether the answer is that it was delivered or it wasn't?

THE WITNESS: It was delivered. It was delivered.

MR. MATHIAS: I move Commission Exhibits 23-A through I, 24-A through G, 25-A, 26, 27 and 28 bereceived in evidence.

MR. McINERNEY: Your Honor, may we know from Mr. Minkler whether his recollection is that all of these documents, to which Commission Counsel has just referred, were actually delivered to Mr. Bartels?

JUDGE HINKES: Can you tell us, Mr. Minkler?

THE WITNESS: I can't tell you. I know they were taken there, but I don't know how many he kept.

MR. MATHIAS: Your Honor, if Complaint Counsel may interpose for a moment, I believe that I can identify each and every one of these documents as having -- correction -- with the exception of 24-F and G, which I am willing to retract from my offer -- each and every one of the documents mentioned were received from A & P's files in response to a subpoena duces tecum.

MR. McINERNEY: I believe that is correct, Your Honor. We don't know when A & P received them. That is all.

MR. MATHIAS: The witness has pretty clearly stated that he personally, along with Mr. Malone, delivered them, he believed, in August of 1965. I think that is close enough.

JUDGE HINKES: Is that correct, Mr. Minkler?

THE WITNESS: Late July or early August is the best that I can give you.

MR. McINERNEY: But you are not sure, Mr. Minkler, as to whether each of these pieces of paper that are before you were delivered, is that correct?

THE WITNESS: That is correct.

JUDGE HINKES: Then, what can you tell us? What do you mean that you are not sure whether they were delivered?

THE WITNESS: I just started to say that Mr. Mathias has answered that. He said they came from A & P's files, so they were left.

JUDGE HINKES: What is your recollection when you went up there and saw Bartels?

THE WITNESS: My recollection is that he disdained all interest in this.

JUDGE HINKES: Did you make a proffer of those documents, all of those documents?

THE WITNESS: Of course we did. And I don't recall -- I didn't recall -- that is what I mean. I did not recall whether he kept them or not. I wasn't sure.

JUDGE HINKES: Then as I understand it, this witness states categorically, that he offered these documents to A & P.

THE WITNESS: That is correct.

MR. McINERNEY: He seems to be relying in part, Your Honor, on Mr. Mathias's statement that A & P had some of these in their files.

THE WITNESS: No, I am relying on the fact that they came from A & P's files. The inference is clear. A & P didn't get it out of thin air.

MR. McINERNEY: Your Honor, we might have gotten them in the course of the investigation.

JUDGE HINKES: That is right, but I think the documents are admissible. Make your argument upon the timing as you see fit.

MR. McINERNEY: I understand Mr. Mathias has

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withdrawn ---

MR. MATHIAS: F and G.

JUDGE HINKES: The documents referred to are received with the exception of 24-F and G.

XXXXXX (Commission Exhibits 23-A through I, 24-A through G 25-A, 26, 27 and 28, with the exception of 24-F and G, are received in evidence.)

MR. MATHIAS: Possibly this would be a good time to take another brief recess and give the witness another breather, and we can line up the next series of documents.

JUDGE HINKES: All right, we will take another short recess now.

XXXXX (A brief recess was taken.)

JUDGE HINKES: You may continue.

By Mr. Mathias:

Q Mr. Minkler, I hand you Commission Exhibit 35-A for identification and ask if you can identify the handwriting thereon, Mr. Minkler. Excuse me, I will hand you the original.

A That is Mr. Malone's writing.

Q Mr. Minkler, I hand you Commission Exhibit 37-A through F for identification and ask you to familiarize yourself with this document, sir.

A Yes, sir.

Q Are you familiar with this document, sir?

A I am.

Q And what is it, sir?

A It is a quotation made to A & P in the middle of August.

Q That is August, 1965, sir?

A Right. And the approach to it was somewhat different than any quotations made previously. On this occasion, as is detailed on 37-A, we set forth the savings to A & P based on the quotes included here if all of their business were changed from Borden brand to private label, and that totaled $400,000.

Q This would be onthe products that were included in your private label quotation?

A That is right. They are all listed on the different zone sheets included with this.

JUDGE HINKES: Are these areas 2, 3, 4 and 5 the same areas that were so marked on the previous memos?

THE WITNESS: Yes, sir.

JUDGE HINKES: But some of them had an area 6.

THE WITNESS: Let's see. What was area 6? I would have to see that. I am inclined to think that ---

JUDGE HINKES: At least the cover sheet was marked for area 6, though I am not sure that an area 6 was included in the tabulations.

THE WITNESS: There were five areas, and I would have to see ---

MR. MATHIAS: Would it help the witness if I handed him Commission Exhibit 21-A and subparts?

1704 THE WITNESS: Areas 2, 3, 4, 5 and 6. I don't find any 6. I don't seem to remember.

JUDGE HINKES: It would appear that although the cover sheets of these exhibits talks of the area 6, the tabulations themselves go from 2 through 5, and it does not include an area 6.

THE WITNESS: I think it must be an error.

JUDGE HINKES: So it is your present opinion that the reference to 6 on the earlier quotations is an error.

THE WITNESS: Yes, there is nothing supporting it.

JUDGE HINKES: And it mentions now of area 1 is the Chicago-Calumet area?

THE WITNESS: That is right. The large area, the metropolitan area.

By Mr. Mathias:

Q Was this quotation delivered to A & P, Mr. Minkler?

A Yes, it was.

Q I hand you Commission Exhibit 36-A through Z-8, Mr. Minkler. I would like you to ignore any handwriting notations appearing thereon, but just the printed material, and ask you to familiarize yourself with that document, sir.

A This is the supporting detail, the computations backing up these savings to A & P.

Q So the supporting detail is Commission Exhibit 36 with subparts, and that backs up the detail on Commission Exhibit

37 with subparts, is that correct, sir?

A That is right.

Q Other than handwritten notations, were the documents which comprise Commission Exhibit 36 with subparts prepared by Borden Company?

A Oh, yes.

Q Do you recognize the handwriting on Commission Exhibit 36, sir?

A Where is it?

Q 36-A is down here.

A I do not recognize that handwriting, no, sir.

Q Mr. Minkler, who would have prepared the various documents, the pages comprising Commission's Exhibits 36 and 37 with subparts?

A This is 36?

Q Yes, sir.

A Joseph Malone.

Q And this would have been under your direction and control, sir?

A That is right.

MR. WHITE: Other than the handwriting?

MR. MATHIAS: Other than handwriting?

THE WITNESS: Oh, yes, thank you.

MR. MATHIAS: For the record, so there will be no mystery document, CX-36 is from A & P's files, and it is presumed that the handwriting was from some official of Respondent A & P.

By Mr. Mathias:

Q Mr. Minkler, you have stated that this offer,comprised of CX-37 with the underlying materials in Commission Exhibit 36 for identification, were delivered to A & P. What was the result? What happened after that?

A Shortly after this, Elmer Schmidt called Gordon Tarr and told him -- had him come up and told him that they were going to ask for competitive bids.

Q And what was your reaction to this news, sir?

A We were greatly dismayed.

Q Why, sir?

A Because we thought with this $410,000 savings to A & P, that this pricing project would ---

Q That is Commission Exhibit 37, sir?

A Yes. -- We thought that would give us the business.

Q Why did the fact that ~~in~~ any competitive bids were to be requested concern you?

A It always concerned us because we were operating in a highly competitive market, there were processors in the market that we knew had the capacity to take care of this business, were,in fact, we could well believe, hungry for it, and we were gravely concerned about the approach that they might take.

In other words, we felt that in order to get this very substantial piece of business they might do some unrealistic bidding.

Q What do you mean by unrealistic bidding, sir?

MR. McINERNEY: Excuse me. I think, Your Honor, at this point, we are getting close to the heart of the matter, and it does seem to me that rather than have the witness tell us what was in his mind, either now or at the time, that the questions ought to be more specifically directed to what was said and done by the parties because the operations of the witness' mind with respect to what might have happened are really not germane, and I am afraid that we get into areas that may not only be irrelevant, but prejudicial.

MR. MATHIAS: Your Honor, I believe that the internal workings of Borden in its deliberations over these negotiations are quite material and can be quite illustrative of not only important facts bearing on Borden's actions, but also on the overall developments between A & P and Borden that followed.

MR. McINERNEY: The questions aren't even directed to what was said and done within Borden. The questions that are being asked are asking Mr. Minkler to project himself back to 1965 and tell us what his thoughts were at the time, whether or not expressed.

JUDGE HINKES: As far as the thoughts of Mr. Minkler are concerned, that would have a bearing, since he was a responsible official of Borden, on the motivations behind

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anything that Borden did, but I don't see how that would have any connection with A & P unless communicated to A & P in some fashion.

MR. MATHIAS: Your Honor, I believe if I am allowed to continue with the questioning, we can show that in some fashion these thoughts were communicated to A & P.

JUDGE HINKES: Very well. You may go on if that is your intention, but I would expect a connection. Otherwise, I think the ruling is fairly obvious that anything that may have gone through the mind of Mr. Minkler, and perhaps indicative of the attitude that is properly attributable to Borden, is not at all attributable to A & P.

MR. MATHIAS: Would the reporter read the last question to the witness?

(The record was read by the reporter as follows:

"Question: What do you mean by unrealistic bidding, sir?")

MR. McINERNEY: Your Honor, my objection is typically that kind of question. What does he mean now when he describes the state of mind he had in 1965? I submit that the better way to get at it would be to ask him what the next meeting was and what was said and done.

JUDGE HINKES: I am going to allow questioning of this witness' meaning as explaining his motivation, at least insofar as it will explain Borden's motivation then, whether or not it will have any bearing upon A & P remains to be seen.

By Mr. Mathias:

Q Do you recall the question, now, Mr. Minkler?

A What do you mean by unrealistic pricing? Yes.

Q Just what do you mean by it, sir?

A We were, as I started to explain, concerned about the approach that competitors might make. One approach that we specially were worried about was the possibility of a competitor being so anxious to get this business that they would approach it on the basis of quoting price built up on direct costs only, that is, leaving out all fixed charges on the theory that fixed charges were already met by their present business.

We call that, for want of a better name, anyhow accounting. In other words, you have your fixed costs all taken care of by the volume of business that you presently have, and here is a nice choice hunk of business up for drabs, so you go in and raw milk cost is so much, the package is so much, the processing is so much and delivery is so much, and there is a chance that someone might approach this business on that basis and bid extremely low.

Q Did you express this concern to A & P, sir?

A Yes, we did, and I can't exactly pinpoint from recollection how and when it was done, but it was done during conversations pertaining to their asking for additional bids. They told us they were going to ask for bids, and right away, Gordon Tarr, because we had discussed this in our office, pointed out that they could get unrealistic prices on this kind of an approach.

Q Did you have any discussions during this period with Mr. Bartels?

A Yes, I did. I had one discussion with him along the same lines, and he said that the only way that they could insure getting the best price possible was to ask for competitive bids.

Q Mr. Minkler, I hand you Commission Exhibit 43-A through C. First I ask if you can identify the handwriting on Commission Exhibit 43-A?

A That is Malone's.

Q I would like you to read Commission Exhibit 43-B and C for identification for the purpose of refreshing your memory, if you can, as to the circumstances surrounding the meeting between you and Mr. Bartels to which you have just referred.

MR. McINERNEY: Excuse me, Mr. Minkler. Before you do that, I would like to object to this procedure. I think that the proper way is to see whether hismemory needs any refreshing before any document is shown to him.

JUDGE HINKES: Yes.

MR. MATHIAS: I withdraw the last question.

By Mr. Mathias:

Q I hand you now Commission Exhibit 42-A through D for identification and ask you to familiarize yourself with that document, sir.

JUDGE HINKES: 42-A through D. Not E?

MR. MATHIAS: No, I am not handing him E at the moment, sir.

By Mr. Mathias:

Q Are you familiar with this document, sir?

A Yes, sir.

Q What is it, sir?

A It is a calculation of what would happen to us, to the Borden Company, Chicago, if we lost the A & P business.

Q Who prepared this document, sir?

A Joe Malone.

Q And was it submitted to you, sir?

A It was indeed.

Q And why was it prepared, sir?

A As I have said before, we were greatly concerned. We were increasingly concerned when we were told that A & P was asking competitors to bid for their business, and we wanted advance knowledge of what would happen to us if we lost the business.

Another consideration in the development of this figure was to make it possible for me to submit it to New York so that my superiors would know they would be kept abreast of developments, that I wanted them to realize too just how dangerous this situation was.

We could lose a million, almost $700,000 in gross income if this business went away from us.

Q What would this loss of volume have done to your operations in the Chicago areas?

MR. McINERNEY: I object to that as being entirely speculative.

JUDGE HINKES: Wait a minute. Perhaps we should first find out, do these calculations show what the loss would be in the Chicago area?

THE WITNESS: Yes, the first page totals there.

JUDGE HINKES: Perhaps that is what you are looking for, then, Mr. Mathias.

MR. MATHIAS: I was going beyond that, Sir. I wanted to know what effect this would have on its Chicago operations if they were to lose this volume of business.

JUDGE HINKES: I don't know that you have established a sufficient foundation for an answer to a question like that through this witness.

By Mr. Mathias:

Q Was this document prepared for your consideration as the chief executive of the Chicago Central District?

A Yes.

Q To guide you in your operation of that business?

A To guide me and to convey to my superiors the seriousness of our situation.

Q I note, Mr. Minkler, on Commission Exhibit 42-A, that the figures appearing thereon are for the ~~circumstantial~~ Sixth period of Borden's year. How many periods were there from the Borden fiscal year?

A Let's see. It was four weeks, so that would be 13, wouldn't it? This was to keep a uniformity in comparison. We kept our general books on a monthly basis, but we would tabulate our A & P sales on weekly basis, so four weeks was a period.

Q Is volume important in your business?

A Tremendously important, of course.

Q Why is that?

A A plant operating at near capacity is obviously going to be far more efficient than one operating at 50 percent capacity. Does that answer you?

Q Yes, sir. And the A & P volume, as represented on Commission Exhibit 42-A through D, represented a substantial portion of your volume in the Woodstock plant, is that correct, sir?

A That is right.

MR. MATHIAS: I offer Commission Exhibits 36, 37 and 42 with subparts into evidence.

MR. WHITE: Might I ask a clarifying question of Counsel?

JUDGE HINKES: Go ahead.

MR. WHITE: Is 36 being offered only for the typewriting on there?

MR. MATHIAS: It is being offered at this time for all but the handwritten notations.

MR. WHITE: I see.

MR. MATHIAS: And also as a correction on the record, I am informed that there are other pages to Commission Exhibit 36. I am only offering Commission Exhibit 37-A through Z.

JUDGE HINKES: Are there any objections?

MR. McINERNEY: I take it Mr. Mathias is not offering 42-E at this time.

MR. MATHIAS: No, 42-A through D.

MR. SCHAEFER: Could the reporter read back the Exhibits that are being offered at this time?

JDUGE HINKES: According to my notes,it is 36-A through Z-8, 37-A through F, and 42-A through D.

MR. MATHIAS: That is correct, sir.

MR. McINERNEY: We have no objection to Exhibits 36, with the subparts indicated, and 37 with the subparts indicated, but Exhibit 42-A is a document not communicated to A & P -- am I correct, Mr. Minkler?

THE WITNESS: Absolutely. It was not submitted to A & P.

MR. McINERNEY: And I would like toask one or two questions with respect to that, if I may.

JUDGE HINKES: Very well, you may.

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By Mr. McInerney:

Q Mr. Minkler, at the time this was prepared, was the Woodstock plant on full stream?

A It was getting close to it, but not on full.

Q Had you had any experience in supplying A & P on a reduced delivery and private label basis at the time this was prepared?

A No.

Q And did you anticipate that there would be additional savings, or increase in margin as a result of those two coming factors? That is, the full operation of the Woodstock plant and reduction in deliveries and other cost savings?

A In these figures, the Woodstock production cost was estimated and delivery cost was estimated based upon full operation.

Q Did you have any experience on which to base the estimate?

A We had lots of experience just based on other operations that we had in our district.

Q So where it says in 42-A, the second figure, total gross margin contribution per point, for example, wholesale root sales, .0632, is that a figure that is applicable to A & P specifically?

A I believe it is. I mean, this is based on an analysis made in the fifth period of the A & P volume, yes.

Q Do you know whether that figure is higher or lower -- is that the same as total gross profit margin?

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A Is it the same as total gross profit margin? You mean including all the other business that we had? What are you saying?

Q No, I am asking whether that six cents and three mills and a fraction is a figure that is roughly a gross profit figure?

A It is roughly a gross profit figure. It is a matter of the cost of milk, subtracted from your average selling price, and you reduce it by these other cost figures.

Q And you say that is the figure that you would have profited on sales to A & P specifically?

A I can't answer that. You are getting too technical for me. I don't really know.

Q Was it possible to make any cost study at all with respect to specific experience with A & P as opposed to your other customers at this time?

A We didn't. We estimated as best we could.

Q But you didn't have any practical experience in supplying them from your Woodstock plant, the private label milk and reduced deliveries?

A No, we did not.

Q So it would not have been possible, would it?

A No, it would not have been possible. We didn't have private label.

MR. McINERNEY: Your Honor, I don't think in addition tothe failure of this being communicated to A & P, I don't think that there is any indication here that this is a specific study with respect to A & P. I think it has a number of infirmities, and I just wanted to point that out. Maybe these go to the weight of the document ---

JUDGE HINKES: I am afraid that is about all we can say.

MR. McINERNEY: But it does seem to me that since it is not possible to examine Mr. Minkler with respect to this to determine exactly what was done -- because I take it this was in Mr. Malone's province, was it not, Mr. Minkler?

THE WITNESS: Yes, it was.

MR. McINERNEY: So he would be the only one who would actually know how he arrived at these figures?

THE WITNESS: I believe so.

MR. McINERNEY: I don't mean to be hypertechnical. I simply want to point out that this is a document not communicated to us,as to which we are unable to examine the authority.

MR. MATHIAS: Your Honor, I think all of Mr. McInerney's objections go to the weight. This document was prepared for this witness' consideration, and he acted upon this document. He had many years of experience, both dealing with A & P and others. I don't think the objection goes to the admissibility at all.

JUDGE HINKES: No the document is admissible. Whether or not it has any impact upon Respondent A & P, however, is another question, and if it hasn't been communicated to A & P, it is going to be difficult, as I see it, to fasten A & P with any responsibility for the data contained in it.

THE WITNESS: It certainly wasn't submitted to A & P. It was for internal use.

JUDGE HINKES: In any event, then 37-A through F is received, 36-A through Z-8 is received, and 42-A through D is received.

XXXXXX (Commission's Exhibits 37-A through F, 36-A through Z-8 and 42-A through D are received.)

MR. WHITE: I understand with respect to 36-A through Z-8, that it is received except for the handwriting on it.

JUDGE HINKES: Yes, that does not include any of the handwritten portions.

By Mr. Mathias:

Q Mr. Minkler, you have testified concerning the notice from A & P of the decision to seek competitive bids and of your meeting with Mr. Bartels. What was the next event in the course of your dealings with A & P?

A I believe the next event was that Elmer Schmidt called Gordon Tarr -- I can't give you the exact date. It certainly was after the middle of August, very close to the middle of August -- and said Gordon, I want you to come up here right away, and when Gordon went to the A & P office, he encountered a gentleman who was pretty distraught.

This is what Gordon Tarr reported to me, that Elmer Schmidt told him that he was terribly shocked, that they had received quotations which made ours appear -- now I am not going to give you the exact words. I don't know the exact words, but it meant that it made ours appear rediculous, and he just couldn't understand that.

He said, considering the fact that Borden had been a supplier of A & P for many years, and that the relationship had always been very friendly and cooperative, and that they had fully expected when they asked us to quote on private label, that they would get a sound price from us, but it didn't happen that way.

We have prices that are much better, from the standpoint of what they yield for us in savings, than your last quotation in which you detailed our savings at $410,000.

Q Was there any indication of how much below your offer the competitive offer was?

A No, there was not, but Gordon Tarr, struggling of course and trying to think of what he might do to salvage it and get Schmidt in a better frame of mind, said something to the effect that, all right, maybe we have overlooked something here. It is conceivable that we might further anticipate a reduction in in-store promotional activities, that if we were to eliminate

the practice of putting up display material and rearranging product in cases and things of that nature, which we lumped together and called in-store service, if we were to eliminate that, maybe we could increase this $410,000 figure by $50,000, and whereupon, Elner Schmidt told him that that wouldn't begin to cover the difference between our quotation and the competitive offers that he had.

Q Did you later attend a meeting yourself with Mr. Schmidt and Mr. Tarr?

A Yes, I did.

Q And did Mr. Tarr ask Mr. Schmidt to repeat these remarks to you?

A Oh, yes.

Q And did he do so?

A He did. He did.

Q What happened after Mr. Tarr came back and reported this meeting to you? What did your group do then?

A We got on the phone with New York, is what we did next.

Q And what was the result of that discussion?

A I can't detail that exactly for you, but we were certainly reporting,Just the way I have tried to describe to you, what had happened and that we still felt that we could go back there if we did it quickly. Elmer Schmidt at least didn't say I don't want to see you again. Gordon left it that, well now, just hold your horses a bit. I want to get back to our office and see my associates, and I again can't give you the exact detailing of this, but at any rate, Gordon came back and we felt that there was a possibility, based upon the relationship we had had over a period of time, that we could still talk further if we had anything important to say.

Q Was there any indication by Mr. Schmidt as to how many competitive offer or offers that he had?

A All I know is that it was plural. He didn't say a bidder or an offer. He said quotations, plural.

Q Following your discussion with the New York office, what steps did you take to retain the A & P business?

A This became not a matter of logic in many respects. It was a matter of struggling to try to guess again what might have been put in there by a competitor. I must tell you that it was just largely ~~peer~~ pure guess. We had the $410,000 figure in, we were clearly told that an additional $50,000 wouldn't begin to cover the difference, there are a facts that we had to consider.

In addition to that, we had had this figure of one million six hundred some thousand dollars that it would cost us if we lost the business. We had to weigh that, and at some point, I said that it seemed to me that we had to consider doubling this $410,000 figure, and you could ask me all night how I arrived at that, and I wouldn't be able to tell you except that we were just determined that we had to save this volume for this brand-new plant that we were just bringing on stream.

We were really desperate and by that time, we were pretty well convinced that the approach by the competitor had been on an anyhow accounting basis, they were going to get it and correct their problem later on, we rationalized, so I again got New York on the phone and got their clearance if I thought this was all that could be done to go ahead.

I was told, save the business, and so Gordon Tarr -- I had Gordon make an appointment again with Elmer Schmidt, and we went up there and this is when Gordon asked Schmidt to again relate, to go back over what he had said to Gordon about our $410,000 quotation.

MR. McINERNEY: Excuse me, I hadn't wanted to interrupt the witness' story before, but two things: I take it that this last testimony, Mr. Minkler, is the same meeting ---

MR. MATHIAS: Excuse me, Your Honor, I object to Mr. McInerney interupting my interrogation of this witness. If he has an objection to make, let him make it.

MR. McINERNEY: Yes, I will make it. I would move to strike that part of the witness' answer that starts, we were pretty well convinced that other people were offering or making an offer on the basis of anyhow accounting, or words to that effect -- I don't have the verbatim in my notes -- since there has been no testimony that that was the subject of a communication from the Borden Company to A & P, other than the previous testimony with respect that somebody might come in with a bid based on anyhow accounting. But I don't believe that -- I think what the witness was doing on this occasion was again reciting the operations of the mind of the Borden Company people.

JUDGE HINKES: Yes. The witness has testified that at one point A & P was told that others might come in and overlook their fixed cost and give a very low price. The witness has further said that he thought others had done so when he was told by A & P that they had some very low bids. But that has not been, at least so far, communicated by Borden to A & P.

MR. MATHIAS: Your Honor, there was the past communication to A & P by the witness that competitors could be expected to come in with a bid based on anyhow accounting, but I would like to ask one additional question.

By Mr. Mathias:

Q At this meeting that you are now discussing with Mr. Schmidt at which you and Mr. Tarr met with Mr. Schmidt, did you mention the subject of anyhow accounting at that meeting, Mr. Minkler?

A I don't recollect that I did.

Q Did you make an alternate offer to Mr. Schmidt at this time? Did you offer the $820,000 savings?

A I did.

Q And what did you mention to Mr. Schmidt as the basis upon which this offer was made?

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MR. McINERNEY: Excuse me, Your Honor. I think we are again at a point where it is inappropriate to lead the witness. I think the question ought to be what was said and done.

JUDGE HINKES: Yes. If this is critical, by all means let's be careful.

By Mr. Mathias:

Q What did you say to Mr. Schmidt when you made this new offer?

A I said, Elmer, we simply cannot lose this business. Now I don't know what approach anyone else had made, but you have made it clear to Gordon Tarr and to me that there is a very substantial difference between our quotations and the quotations that you got from someone else, and since you covered this with Gordon we have done a tremendous amount of discussing of this situation. We have got to hold this business. I am prepared today to tell you that we will double the savings figures that we submitted to you on the 13th. That will be $820,000.

Q Did you say anything else to Mr. Schmidt at this particular time concerning the basis of your offer?

A It is my recollection that the only thing I said was that we had no way of knowing really what had been offered to him, but we were doing this on the basis of meeting competition. This is what we hoped we were doing.

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Q And did you make any mention to him of how you had arrived at the $820,000 figure?

A I don't recall that I did.

Q MR. MATHIAS: Your Honor, at page 206 of the transcript of the deposition of December 1, 1971, the witness ---

MR. McINERNEY: Excuse me. I am sorry, Mr. Mathias, but I am going to object to any description of the witness prior testimony in the presence of the witness.

JUDGE HINKES: Is it your object to refresh the witness's recollection of events?

MR. MATHIAS: Yes, Your Honor. I was going to have him read the testimony first to see if it refreshed his memory.

MR. McINERNEY: May we have a conference out of the presence of the witness?

JUDGE HINKES: Very well.

Mr. Minkler, would you be good enough to step outside the room for just a moment?

THE WITNESS: Yes indeed.

(The Witness withdrew from the courtroom.)

MR. MATHIAS: On page 206 of the transcript of the deposition testimony, Mr. Minkler was asked specifically, "Did you inform Mr. Schmidt that this bid was based on an anyhow accounting?" In his answer he stated, "I used the term anyhow accounting, yes."

Now, he has stated that, and at the moment that he has exhausted his memory of what he has stated at that particular meeting. He had a further memory back two years ago when this deposition was taken and I believe that I should be allowed to refresh his memory on this point and make my offer if he cannot be refreshed of the original transcript page.

MR. McINERNEY: Your Honor, in order to appreciate my objection to this you would have to be aware that this testimony that Mr. Mathias has just referred to is entirely misleading in that it does not refer to the particular meeting he is now testifying to. As he said previously, he used the words "anyhow accounting" in talking to Mr. Schmidt on a prior occasion. There had never been ---

MR. MATHIAS: No. Mr. Bartels.

MR. McINERNEY: I am not aware of anyplace in which he said that he told him that this particular submission was on the basis of anyhow accounting, and what Mr. Mathias has read to you is an answer that simply says, "I used the term anyhow accounting". He did not testify that he used it with respect to the particular submission of the Borden Company that that was based on anyhow accounting, and I submit this was a critical issue as to which the witness may be mislead if he is allowed to have his testimony guided by Mr. Mathias as in this fashion.

MR. MATHIAS: I would refer back to 203 at least to show that we were referring at this point to his visit in

September when he delivered the new bid. The figure had doubled the $410,000 figure. There was no such figure even in his mind at the time that he approached Mr. Bartels, and the discussion, although here -- here we are talking on page 204, "I gave him this figure and his response is, 'Well now you are talking. Now you are in the ball park.'"

JUDGE HINKES: It seems clear to me, Mr. McInerney, that that is the conversation that is being referred to there. They are talking about $820,000.

MR. McINERNEY: No, Your Honor. The answer was perhaps not responsive to the question. The question was, "Did you inform Mr. Schmidt this bid was based on anyhow accounting?" The only answer was, "I used the term anyhow accounting", but he did not testify that he used it in reference to this bid.

JUDGE HINKES: You may make the argument, but I think the argument is for your brief and, frankly, I don't buy it.

MR. McINERNEY: I think it may come too late, Your Honor, if he is confronted with something that looks like he testified previously.

JUDGE HINKES: In fact that may make it important that he answer now, because if there is any doubt, perhaps he will clarify it right here and now, and perhaps he will testify that he was referring to anyhow accounting in reference to another event and not to his Schmidt offer of $820,000.

MR. McINERNEY: May I simply ask, in order to do this

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as fairly as possible that -- I would like to read the whole transcript in order to find out where this started.

MR. WHITE: It starts on page 200.

Your Honor, could I say something?

JUDGE HINKES: Yes.

MR. WHITE: First, as far as refreshing his recollection, I have no objection to that, but I think we ought to start on page 200 where he starts his testimony regarding this meeting with Mr. Schmidt. I think part of the confusion arises here because of the way that the evidence is developed. He is asked what he said. He is never allowed to start at the beginning of the conference and just recite what everybody said, and it has made it very difficult for the witness to recall because he never gets into explaining the entire thing. But I suggest if he is going to be shown a passage, he should be shown the surrounding passages which lead up to it.

MR. MATHIAS: I started at least on 203. I have no objection to going back to 200.

MR. WHITE: I think that is where it starts. If you are going to try to refresh his recollection in fairness to him I think we ought to submit to him what information there is.

MR. MATHIAS: I had just gone back briefly ---

MR. WHITE: I wasn't meaning this as a criticism. I would just like to have it done.

MR. McINERNEY: I think actually, just at a quick glance, 200 to 209 gets the surrounding testimony in.

JUDGE HINKES: Well there are two ways in which this can be done. The witness may be asked whether he recalls saying something about anyhow accounting when he met with Mr. Schmidt. This is a leading question and it is perfectly permissible once you have exhausted a witness recollection. On the other hand, a witness can be shown the deposition in which this term was used and which possibly it is argued was at that conversation with Schmidt, the conversation in which $820,000 was mentioned.

Either one of those two approaches is entirely appropriate at this point. The probative value of the answer, of course, is diminished because of this prompting that counsel will have to engage in, but that does not make it inadmissible.

MR. McINERNEY: Your Honor, later on in this same transcript he testified that he did not advise A & P that this bid was not cost justified and I think in fairness to him again that page might be shown to him at the same time.

MR. MATHIAS: Your Honor, again this is the same as your prior ruling. It is cross-examination.

JUDGE HINKES: That is right. This is Mr. Mathias' case in chief. You may attack it as you please in your cross-examination and in your defense, but I don't think it is at all proper for you to dictate how Mr. Mathias presents his

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case or to ask me to dictate to him. I don't think that is permissible.

MR. McINERNEY: Your Honor, I think it is fairer to the witness to give him what his entire testimony was.

JUDGE HINKES: The witness will have that opportunity when you cross-examine. You are not here just to be silent.

MR. McINERNEY: I hope not, but Your Honor sees my point. If you are refreshing the witness recollection from one transcript, if there is some clarifying part of the transcript that might also help his recollection -- and I can dig that out for you in 15 seconds, and it is only a page -- I think that that would be a much fairer way to give him that at the same time.

JUDGE HINKES: Possibly so, but I don't think I should subject Complaint Counsel's case to interruption. This is something you will have to contend with. It is true in any case. The witness on cross-examination contradicts his former testimony. It would have been much better had that come at the same time he made his former testimony, but it isn't happening and we are not going to change our rules here for this.

MR. McINERNEY: I believe Your Honor that there is precedent for saying that when part of a deposition is used that the time to bring out any clarifying parts is at that time and not at some later stage of the proceeding, and that is why

I was pressing that particular point.

JUDGE HINKES: I won't argue that point with you because I am not in a position to say that there is authority to the contrary or to correct your statement that there is authority for your proposition, but in any event it is my ruling that we shall not interrupt Complaint Counsel's case to offer additional evidence which would correct or modify anything said by the statement in response to Complaint Counsel's question. That will be done if it is necessary, or if it is desirable upon cross-examination, or in your case in chief when you present your defense.

MR. McINERNEY: All right, sir.

JUDGE HINKES: Would somebody call the witness back, please?

(Witness reentered the courtroom.)

By Mr. Mathias:

Q Mr. Minkler, I would like you to read pages 200 through 209 of the transcript I am handing you. The list of corrections do not appear to be appended, but I will get those for you too.

A Just through 209?

Q Yes.

A I have read it.

Q Does the reading of this transcript refresh your memory as to any further discussions you had with Mr. Schmidt at this meeting which you and Mr. Tarr attended?

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MR. McINERNEY: May we have the date of the meeting that the question refers to?

JUDGE HINKES: Yes. Let's have that clearly identified.

By Mr. Mathias:

Q Do you recall the approximate date of that meeting, sir?

A Well, the approximate date, but I don't know the exact date.

MR. McINERNEY: There were several meetings and what I would like identified clearly is which meeting Mr. Mathias is referring to.

MR. MATHIAS: I am referring to the meeting, Mr. Minkler, in which you submitted for the first time the $820,000 figure to Mr. Schmidt. Do you recall the approximate date, if not the exact date of that meeting?

THE WITNESS: I can give you an approximate date, yes. I know it was after this submission of August 13, so I know it was quite soon -- I believe it was quite soon after that that we went over with the $820,000 figure.

MR. MATHIAS: So it would have been late August or early September, 1965?

THE WITNESS: Oh, I think it was still in August.

By Mr. Mathias:

Q Now, does the reading of this section of the transcript refresh your memory as to any other conversation between you and Mr. Schmidt on that occasion?

A Well I thought I had just got through saying practically the same thing as here. I hadn't gotten as far yet as to say that we were told to go back and spread this total $820,000 to the individual items, but I was stopped before we got there.

Q At this point of the negotiations the $820,000 figure was not spread to the various items?

A No, no. We hadn't gone that far at all. I was getting over there with an overall amount, certainly hoping that I would get some indications as to whether or not we were still being considered, could still be considered.

Q And what did this overall amount represent?

A Savings to A & P, $820,000.

Q And what was that based upon from Borden's point of view?

A As I thought I said, it was pretty much pure gamble. It was based upon, "Here's a $410,000 figure. We had talked over the anyhow accounting thing that a competitor might employ, and that entered into it but ---

Q Did you mention this term to Mr. Schmidt?

MR. McINERNEY: May we identify the time again?

MR. MATHIAS: We are talking about the same meeting, Your Honor. I don't think there is any question as to that.

MR. McINERNEY: I don't think it was clear from the question, Your Honor, when.

JUDGE HINKES: So the witness understands, we are

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only now talking about the meeting at which the $820,000 figure was broached for the first time to A & P. It was at that meeting with Mr. Schmidt that we are now concerned.

THE WITNESS: I understand.

JUDGE HINKES: Now then, did you raise the question then of competitors pricing?

THE WITNESS: I am sure I did, yes.

JUDGE HINKES: How?

THE WITNESS: In a general way. I don't know how I can say how. I know that I was trying to still appear logical from our standpoint. I was in a way half embarrassed not to be able to know what kind of a bid they might have, but obviously you couldn't ask, and you couldn't have gotten an answer if you did, so ---

By Mr. Mathias:

Q Well, in the course of this discussion did you at any time mention the phrase, "anyhow accounting" to Mr. Schmidt in this discussion?

A I am sure that this phrase was mentioned sometime, but I don't know whether it was mentioned at this particular time.

Q You have no present recollection of that.

A No, I do not.

MR. MATHIAS: Your Honor, I move that pages 200 through 209 of the deposition transcript be received in evidence as corrected as CX 260 with appropriate subparts.

MR. McINERNEY: Your Honor, I object very vigorously to that. I don't see how there has been any basis laid for that whatsoever. Indeed, I am not familiar with any other proceeding at which parts of a deposition have even been offered in evidence in this manner.

MR. MATHIAS: Your Honor, Rule 32 of the Federal Rules of Civil Procedure allow for the introduction of parts of these depositions in these circumstances.

MR. McINERNEY: While the witness is on the stand? I don't think so.

JUDGE HINKES: Our rules are a little more specific and I direct your attention to 3.33 dealing with depositions, subparagraph (f) 2, "Subject to appropriate rulings on such objections to the questions and answers as were noted at the time the deposition was taken or as may be valid when it is offered, a deposition taken to preserve real evidence or any part thereof may be used or offered in evidence", and so on. And it goes on to allow the reception in evidence under such circumstances, "In exceptional circumstances as to make it desirable in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing to allow the deposition to be used."

MR. McINERNEY: Your Honor, I think that that indicates that it is not to be used when the witness is present in open court and testifying orally in an open hearing, and I am not aware of any other proceeding at which this has ever been done where the witness was on the stand. Of course if the witness is not present it is not necessary to offer the whole deposition at once. You may offer parts of it, but where the witness has testified to the best of his recollection what happened and has testified fully, it does seem to me that this is an attempt to get in through the back door something that couldn't possibly come out any other way.

JUDGE HINKES: I don't agree with you. If this witness were not available to be present today the testimony at the deposition would certainly be acceptable, and I think you would agree. The fact that he is here is the only thing that changes that picture.

Now then, although he is here he cannot remember. As far as we are concerned his testimony is not available in this respect. He does not remember. He does not deny. He does not remember. And under those circumstances his testimony should be receiveable in the interest of justice and fair play because that represents obviously a period of better remembrance on the part of this witness.

MR. McINERNEY: But, Your Honor, my objection also goes to the fact that the testimony being offered is not probative with respect to the matter for which it is being offered. In other words, I read the testimony that is being offered as giving Mr. Mathias no help whatever for the purpose for which he is offering it.

JUDGE HINKES: That is a matter of argument. But it is admissible. Objection overruled. 260 A through J -- I guess it would be. Is that correct?

MR. MATHIAS: Let me double check that, Your Honor. The corrections were already included in our earlier exhibit so that should be correct, sir. They would not have to attend this as well.

MR. McINERNEY: Your Honor, I don't mean to reargue this, I simply want to note that the rule to which Your Honor refers I don't see any ground for accepting part of a deposition on the basis that the witness doesn't remember something.

JUDGE HINKES: The very first sentence speaks of the deposition or any part thereof, and I believe that that language applies to the rest of the paragraph. I don't think there would be much point in repeating this phrase several times for each of the subdivisions.

MR. McINERNEY: I am sorry, Your Honor. I meant to say -- and if I didn't make it clear I apologize -- that it does not say that the deposition or any part thereof may be accepted in evidence when the witness is on the stand and does not remember. I think that the testimony was fairly clear and the best that you can say for it is that he doesn't remember now.

I won't argue this point at any length at the moment ---

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JUDGE HINKES: Well, as I said before, Mr. McInerney, what you are saying in effect is that if the witness presents himself and doesn't remember, we can't use the deposition, but if he doesn't show up, then we can use his deposition. That is even worse than not remembering.

MR. McINERNEY: Your Honor, I am saying that when the witness shows up and testifies to the best of his ability as to what happened, then that is the testimony that ought to be accepted in this case, and that you can't have it both ways. You can't use the deposition testimony and the live testimony; if you don't like the live testimony, switch to the deposition testimony.

JUDGE HINKES: I understand what you are saying. I am not buying it and I think I have explained it adequately on the record. As far as this witness is concerned if he had denied that expression of "anyhow accounting", that would be a different story. Then you would have a denial as against an admission, and Mr. Mathias would be in a position of trying to impeach his own witness, but he now says he just doesn't remember, and that is a little different animal here, and under those circumstances his positive statement taken at the deposition should be received in evidence as the best evidence of what occurred at the time, and that to me is a clear occasion for the use of subparagraph ~~5~~ (v) of section 3.33 ~~of~~ (f)(2) of our Rules.

Did we get the sub-lettering for that?

MR. MATHIAS: A through J, Your Honor. That was correct.

JUDGE HINKES: Very good.

260 A through J is received, being the deposition pages 200 through 209.

(Commission Exhibit 260 A through J was marked for identification and received into evidence.)

MR. McINERNEY: May I remind Your Honor -- and I apologize. I won't keep at this -- but I would like to remind you that I had offered to bring in a portion of the deposition which is inconsistent with the purpose for which this is being offered and which I think would cover Your Honor's point with respect to a denial.

JUDGE HINKES: You will have that opportunity and again if I was wrong the motion to strike is always available, and I will be glad to entertain it upon a proper showing.

By Mr. Mathias:

Q Now, Mr. Minkler, was anything stated at this meeting then concerning the spread of this $820,000 to the product line?

A Yes.

Q What was said in this regard, sir?

A Go back and spread it and let me see it. This sounds very interesting.

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Q And what did you do at this point, Mr. Minkler?

A We went back to the office and immediately went to work spreading it to various items and the various areas.

JUDGE HINKES: This might be an appropriate time for a break.

MR. MATHIAS: Yes, I think it might be, sir. We have been trying to line up our final exhibits for today, and I think we are sufficiently along with the witness so that we will be able to have made meaningful progress by seven, and possibly we could start at ten o'clock in the morning to give us all a few minutes extra rest.

JUDGE HINKES: Well, in any event we will take a short break at this time and we will expect to break off for the day at around 7:00 o'clock, and we will talk about the time to resume tomorrow then.

(Brief recess taken.)

JUDGE HINKES: On the record.

You may continue, Mr. Mathias.

By Mr. Mathias:

Q I hand you Commission Exhibit 56 A through X and ask you to familiarize yourself with this document, sir.

A Yes, Mr. Mathias, I recognize it.

Q Are you familiar with this document?

A I am.

Q What is it, sir?

A It is a spread of the $820,000 to various items, including glass gallons.

Q Was this quotation tendered to A & P?

A Gordon Tarr and I either on the 14th or 15th went up to A & P with this intending to give it to Elmer Schmidt and he was not there. His wife was expecting a baby and he was home. So we gave the bid to his assistant. His name is Hall, Robert Hall. Bob Hall, I think. We gave it to him, and He said that he would see to it that Mr. Schmidt got the figures promptly.

Q Now the glass gallons was a new item in your quotation, was it not, sir?

A We thought when we went back after that meeting where we first mentioned the $820,000, we reasoned that we could put part of this spread part of this to glass gallons. They had at some time or other said that they thought the glass ought to be private labeled too, and we had some discussions about that because it wasn't very apparent how a glass jug could be made to convey a different label. All you had to work with was a small plug tab that went in the top of the glass bottle which you would change from Borden's to A & P or Ann Page, whatever they wanted.

So in putting this detail together we decided that well, we would put part of it on the glass containers and that is the way we gave it to this Mr. Schmidt, and Mr. Schmidt very shortly called Gordon Tarr and said this glass thing won't do

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at all. You put a cover in here now, he says, I can't compare your detailing to detailing I have from other bids because glass gallons were not covered in the other bids.

Q Mr. Minkler, you used the date of your original meeting with Mr. Hall as the 14th or 15th?

A Or 16th, I don't know when.

Q For clarification purposes this was in September of '65?

A Oh, yes.

MR. MATHIAS: I move Commission Exhibit 56 A through X into evidence.

JUDGE HINKES: Is there objection?

MR. McINERNEY: No, Your Honor.

JUDGE HINKES: It is received.

(Commission Exhibit 56 A through X, previously marked for identification, was received in evidence.)

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By Mr. Mathias:

Q Now, what occurred after you received word from Mr. Schmidt that the glass gallons were not acceptable?

A We immediately took them out of the picture and spread the $820,000 to the other items.

Q This is the items that you had been previously negotiating with A & P on?

A That is right.

Q I hand you now Commission Exhibit 62 A through Z and ask you to familiarize yourself with this document, sir.

A Yes, I recognize it.

Q What is this document, sir?

A This is the final quotation with the A & P savings spread to the private lable items and to the various areas.

Q Now, how was this final quotation tendered to A & P, sir?

A Gordon Tarr and I arranged to meet Elmer Schmidt out in his home village Libertyville. His wife had presented him with a new youngster and he was staying home for a few days, and we made a date to meet him at a VFW Hall, I guess he was an officer in it, anyhow he had a key to it. We met there. We were the only ones there.

Q And what occurred at this meeting, sir?

A I told him, apologized first for having put the glass gallons in the picture, but I told him that we had a mistaken impression that he might like that, and we are perfectly satisfied to take them out and that now the $880,000 had been spread to the same items as in our previous quotation and I gave this to him. He looked it over and said, "Well, this certainly looks like that is the way it should be," and he said,"this is fine. I am very pleased. I will recommend to my superiors that we proceed on this basis, and I am very happy that I can do that."

Q And what did you say to him on this occasion, Mr. Minkler?

A Well, I thanked him for being patient with us, but I said, "Elmer, there is certainly something here that I want you to very definitely understand." I said, "This price is given to you by us on the feeling and belief that we are meeting a competitive bid. We know of no other way to justify this. You have to accept it on that basis. You must make that clear to your superiors and to your legal people. I don't know what may come of this in the future, but I want you to understand this we are going to say always that we felt we were meeting a competitive offer that you had received from someone else." And he said to me, words to the effect, "Ralph, you don't need to worry. I read you loud and clear. I understand what you are saying. My superiors and our legal department will understand it." And he says, "Just don't worry about it".

Q Now, Mr. Minkler, at that time that you made this statement to Mr. Schmidt did you ask him to save the competitive offers?

A Oh, I did. I certainly did. I said it is tremendously important that you save the quotations that you had from competitors. They will conceivably be extremely important sometime in the future, and he says, "They will be saved."

Q Mr. Minkler, in connection with your earlier testimony you mentioned the amount of $850,000, whereas previously all of your mentions had been to savings of $820,000. Would you explain any apparent inconsistency here, sir?

A I don't know that I can offhand. I think that it is the way the volume worked out.

Q The Commission Exhibit 62 B is a summary sheet which does contain the figure?

A 882. There is some explanation for that, and I am trying to recall it.

Q Is it possible that this accounted for the fact that some of the offer in some of these areas was still based upon prior raw costs and there had been some increases in raw costs?

A I wouldn't think so, but that might be it. I think I would have to study this to answer your question. I just plainly don't recollect offhand why that large difference developed.

Q You have no present recollection of the reason for this difference, is that correct, sir?

A No, I have not. It must show up in these computations someplace, but I can't pick it up that quick. I must add something else too that occurs to me, in this same last meeting there certainly was discussion about their cooperation with us in the matter of pre-ordering and modified delivery, and doing everything that they could through their stores to help us reduce the cost in serving their stores. This was covered at the same time in a general way, and Schmidt was being, well very understanding, and said that he with Tarr, they would work closely together on this, and that they would do everything they could.

Q Referring to CX 62 X, and following in which there are some computations involving the formula price for raw milk, I notice that down at the lower portion of the page there is a calculation of the cost of the 3.4 percent finished product. Was that to be the butterfat content of the A & P labeled product?

A Yes.

Q And I think you have previously stated that this was the same butterfat content to which you standardized your own product?

A That is correct.

Q Was there ever any discussion between A & P and Borden that would indicate that they desired anything other than your normal formula or composition for milk and other dairy products?

A Not that I am ware of.

Q And did you subsequently begin to serve A & P under the terms contained in Commission Exhibit 62 A and other subparts?

A Yes, we did.

Q And in the course of that supply were the products which you supplied to A & P under private label any different in physical and chemical composition than those same products put out by your company in this same area under your own label?

A They were not.

Q Now, you mentioned that there were various changes in your delivery that were a portion of the final offer to A & P and which I note are a portion of Commission Exhibit 62 beginning with 62 P. Was Borden able to effect any change in the number

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of delivery days within the City of Chicago and suburbs?

A No.

Q So the union contract still required a six-day delivery?

A That is right.

Q Were these union contracts negotiated individually by each dairy in Chicago or were they done as a group by all of the dairies?

A As a group.

Q And were the negotiations over such contracts public in nature?

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MR. MCINERNEY: I object.

I don't understand the question.

THE WITNESS: I don't know what --

JUDGE HINKES: The witness doesn't seem to understand.

By Mr. Mathias:

Q At the time of various negotiations between Borden and the other dairies and the various milk workers' unions in the Chicago area, did these negotiations appear in the local newspapers?

A Yes; to some extent. Yes; they were in the newspapers.

MR. McINERNEY: Is the question whether these negotiations took place in public, Mr. Mathias?

MR. MATHIAS: The question has been asked and answered, Your Honor.

If Mr. McInerney wishes --

JUDGE HINKES: Do you wish to have the question and answer re-read?

MR. McINERNEY: Well, I am just not sure what has been said. I think the witness said that there was some reference to them in the paper as to whether or not they were public, and it does seem to me that the two are different.

JUDGS HINKES: They may very well be different, but those were Mr. Mathias's words.

MR. McINERNEY: I thought it would be a good idea to clarify at this point.

By Mr. Mathias:

Q Mr. Minkler, first of all, let's establish when did service begin under the terms of this arrangement?

A I think it was close to November 1st. We had to get in cartons and get set. It took a little while. I think it was around November the 1st, the first week in November.

Q That would be in 1965, sir?

A That would be in 1965.

Q Now, at the time that this arrangement was in effect and when you began to deliver private label milk and dairy products to the A&P Stores, how were these deliveries handled? Were there special trucks for the delivery of the A&P product?

A No; but I want to add something.

When it comes to detailing how we worked with A&P on this private label you would be accepting good advice if you get the detail of it from someone other than me.

After this bid was accepted, the Chicago operation took over this whole affair. I began doing some other things. This had tied me down for many weeks and Joe Gose, Joe Malone stayed in the picture with Joe Gose, and Gordon Tarr and Joe Malone working on the details and the implementation of this whole thing much more than I from here on.

MR. MATHIAS: I move Commission Exhibits 62-A through Z-2into evidence, sir.

JUDGE HINKES: Is there any objection?

MR. McINERNEY: No objection.

JUDGE HINKES: 62-A through Z-2 is received.

(The documents referred to, heretofore marked for identification Commission's Exhibits 62-A through Z-2 were received in evidence.)

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By Mr. Mathias:

Q Mr. Minkler, I hand you Commission Exhibit 54-A and B for identification and ask you to familiarize yourself with this document.

A Well, this is again a computation, mathematic, by Joe Maloney.

Q Have you see this document before, Mr. Minkler?

A Oh, I believe I have but I don't recollect it specifically. I would have to study it.

Q Mr. Minkler, I also hand you Commission Exhibit 55-A through E, which is two handwritten pages and a three-page typewritten transcription thereof, and ask you to read this document to see if it refreshes your memory as to the circumstances surrounding 54-A and B.

MR. McINERNEY: The witness is being asked to read this for what purpose?

MR. MATHIAS: To determine if it refreshes his memory concerning the preparation and meaning of Commission Exhibit 54-A and B.

MR. McINERNEY: His present testimony is that he doesn't recall that.

Is that what you are saying?

MR. MATHIAS: Yes.

MR. McINERNEY: If that is clear on the record, then I don't have any objection.

JUDGE HINKES: That was my understanding.

THE WITNESS: Well, we are backing up here. I mean, we have gone by this already, haven't we?

MR. MATHIAS: That is correct. We are back in the course of the negotiations.

By Mr. Mathias:

Q Are you familiar, first of all, with the handwriting on Commission Exhibit 55-A and B?

A That is Joe Malone's.

Q Now, does the reading of this memorandum refresh your memory as to the preparation and meaning of Commission Exhibit 54-A and B?

A Well, not particularly, but obviously this is just a detailing of the $382,000 that we were giving up and it was a saving to A&P. Here's $8500 a week --

MR. MATHIAS: The witness is referring to Commission Exhibit 54-B.

MR. McINERNEY: I am sorry, Mr. Mathias. I don't see that figure on 54-B. I don't know what the witness is doing except reading from a document that he says he has not seen before.

MR. MATHIAS: No; he did not say he had not seen it before. He said he recalled seeing it.

MR. McINERNEY: He testified earlier that he hadn't seen any of these handwritten Malone memoranda before.

JUDGE HINKES: Well, let's ask the witness to be sure.

MR. MATHIAS: All right.

THE WITNESS: Now, what is the question?

MR. MATHIAS: I was questioning you concerning CX-54-A and B. I don't know what Mr. McInerney is questioning you about.

MR. McINERNEY: If you would like, I will be happy to clarify it.

I believe you have before you, Mr. Minkler, Commission Exhibit for identification 55-A and I believe you identified that as Mr. Malone's handwriting.

THE WITNESS: I did.

MR. McINERNEY: Have you seen that before?

THE WITNESS: No.

MR. McINERNEY: Now, where did you get the eight-hundred-thousand-dollar figure to which --

MR. MATHIAS: Your Honor, I object to Mr. McInerney talking over my examination of this witness.

First of all, he has now interjected an entirely new element into this. I have not questioned the witness at all concerning the Malone memorandum -- that is Commission Exhibit 55 -- except for the identification of the handwriting thereon, and my other questions have all been directed at Commission Exhibit 54-A and B.

MR. McINERNEY: Well, that was precisely my objection. You said that there was something in that exhibit that the witness was testifying to when he mentioned the $800,000 figure and I believe that he was simpling reading from 55-A, et cetera when he mentioned this figure and it is not on 54-A or B.

Youcan correct me if I am wrong.

THE WITNESS: I guess you are right.

No; I read that wrong.

That is $8490.27 per week.

I told you I would have to study this.

MR. McINERNEY: I think Mr. Mathias incorrectly summarized your testimony when he said you were referring to 54-A or B when you gave that other figure.

MR. MATHIAS: Your Honor, it is all very argumentative and I don't believe that we are getting anywhere.

I do think that the witness has also stated that the memorandum does not refresh his memory concerning 54-A and B; is that correct, sir?

THE WITNESS: That is right.

MR. MATHIAS: That ends my questions concerning the exhibits here.

JUDGE HINKES: Very well.

MR. MATHIAS: Your Honor, we are at the point where we will be getting into a different area of questioning with Mr. Minkler and I think a much shorter area. I think that this would be an appropriate time to end for the day. If we start probing any other area, we can't make enough progress by seven o'clock to justify it.

JUDGE HINKES: Off the record.

(Discussion off the record.)

JUDGE HINKES: Back on the record.

By agreement between counsel, it has been arranged to have Mr. Mathias turn over statements given him by the witness, Mr. Minkler, to Mr. McInerney.

MR. MATHIAS: No, sir; not to Mr. McInerney, Your Honor.

This is a non-verbatim interview report.

Excuse me.

We have already turned over our verbatim report which was a transcript of some testimony given in an investigational hearing in Chicago. We did turn that over to Mr. McInerney prior to the depositions in this matter.

JUDGE HINKES: Then I misunderstood.

I assumed from what Mr. Inerney said that you had statements from Mr. Minkler and that is what Mr. McInerney wants.

MR. MATHIAS: Yes; he wants it, sir.

At the Deposition hearing in December of 1971, some 100 pages of the transcript were spent in determining whether or not a certain interview report obtained by Mr. Palewicz's witness --

JUDGE HINKES: Well, let's not call that statements. That is where you went off the deep end.

MR. MATHIAS: An interview report.

JUDGE HINKES: A statement of a witness is a statement of a witness, and Mr. McInerney is entitled to it. Whether he is entitled to it right now or when you have finished your case in chief is another question, but we are not going to worry about that at the moment.

You are telling me you have no statements of Mr. Minkler --

MR. MATHIAS: I have no verbatim statement of Mr. Minkler; that is correct.

JUDGE HINKES: All right, Mr. McInerney.

MR. McINERNEY: Your Honor, at the deposition of Mr. Minkler, we did go into this in some detail and Mr. Palewicz's witnesses at that time testified with respect to the manner of taking statements such as the statement of Mr. Minkler and perhaps the easiest way to do this would be for us to cite you to the transcript pages or to make a Xerox of the transcript pages with respect to that. But there are three basic grounds on which we questioned the statement:

One was the testimony of Mr. Palewicz's witness at page 311 of the transcript, included the following:

I asked him how his field reports got typed up from his interview notes which he had testified he destroyed after he had them in typed form, and the question was how does the document get typed? Do you dictate from some notes or how does that get done?

And he said, usually during the course of an interview I do take handwritten notes and usually my practice is to show these to the party I am interviewing so that any corrections can be made.

Now I will come back three or four times on the same question. I may ask the same question four or five different ways to get what the actual facts are because sometimes a man may be a little afraid; he may be a little bit nervous, or he may tell me something that he may later want to correct, and I asked, and you want to make certain that your report is accurate; is that correct?

And Mr. Palewicz's witness answered, well, yes.

Well, Mr. Smith, or whatever it is, review my notes. Do you see anything there that is not accurate? Unquote.

And he said, "No; that would be fine." Then

I would take it.

Now, whether or not I followed this exact procedure at this time I cannot recall at this particular time.

Now, Your Honor, that was the general practice.

He later indicated that he could not be sure he followed it at this particular time. He also indicated at a later stage that there were in this particular interview report of Mr. Minkler some verbatim quotes in quotation marks reflecting a statement of the witness, at least in part. And we asked that the entire interview report be turned over to us on several bases. One is that we have had problems here today with respect to the witness's recollection and whether it is as clear now as it was closer tothe events and I think since we cannot possibly ourselves reconstruct his statement on the basis of Hickman against Taylor, we should be able to get the production of that even though it be work product of oppPsing counsel.

Secondly, to the extent that the statement may contain any exculpatory material -- and, of course, I have no way of knowing whether it does or not until I can look at it -- I believe that we are entitled to it.

And, thirdly, to the extent that it is a substantially verbatim statement of the witness, we believe that we are entitled to it on that basis, as well.

The first two bases would not require any review by

Your Honor of the interview report, however denominated -- I will use that terminology just on the basis of what Your Honor has said to Mr. Mathias. With respect to the third aspect of it, we believe that the better practice would be that this be turned over to us directly on the basis of the usual procedure in making these statements and, incidentally, I am advised that more recently this is the procedure that the Federal Trade Commission attorneys use with respect to every witness.

In other words, they actually attempt to make them verbatim statements to the extent possible,

Now, on all those bases, without belaboring the point, Your Honor, we think that we are entitled to this interview report either at this time or at the conclusion of Mr. Minkler's testimony tomorrow. But it would save time if we could get it over this evening and work with it.

JUDGE HINKES: I issued an order inwhich you made a request for interview reports and denied that request. It was my conclusion that these reports were not statements of the witness. They were statements of the attorney. There was nothing to indicate that the witness had seen it. It may be that the general practice of investigators at the Commission is to read the document to the witness to make sure that the witness agrees to it, but that does not prove that this document was so read.

MR. MATHIAS: Your Honor, I hate to interrupt you, but I would like to point out this particular interview report was not one of those reviewed by you. It was withheld, as we noted in our submission to you, on the grounds that it had been the subject of very lengthy discussion at the deposition hearings and had been ruled upon by Judge Shroup as not being either verbatim nor substantially read.

JUDGE HINKES: Yes; I understand that.

MR. MATHIAS: Oh, as long as you understand.

JUDGE HINKES: I was merely saying that I had expressed my point of view with respect to these interview reports and I see no reason for departing from that rule, plus the additional fact that in this particular instance the matter has been ruled upon, but that, of course, doesn't say that you may not raise the issue once again with me at this juncture of the case, and I think that you are entitled to raise that issue and you are entitled to have me look at the document for my ruling on that particular matter.

I only mentioned the earlier order of mine to make you realize what my point of view is with respect to these interview reports and I am not going to change my mind on that score.

If the interview report says my standards as I have enunciated them in that order, you will be entitled to them. Otherwise, you will not.

MR. McINERNEY: Your Honor, I would like to point out that in your previous order with respect to other interview reports you seemed to rely on statements in the report that the attorney-investigator had put into the report which, in effect, would advise people reading it that the interview report was not Jenck's Act statement.

JUDGE HINKES: Let me correct you.

That is not what I relied upon. It is not on the interviewer's statement that I rely. It is on the absence of positive indications that the witness did, as a matter of fact, read the document. In other words, had the interviewer said nothing, my ruling would be the same.

I want that document in some fashion to show that the witness read it and adopted it or have the witness so say, if necessary, but that latter approach has not been approved by the Supreme Court because you get involved in a question of credibility with the witness, himself, then.

MR. McINERNEY: Your Honor, I think that you relied in part on scsuch matters as "no quotation marks appear". That is a quotation from your order.

With respect to the Minkler interview, apparently quotation marks do appear.

I think this is something different from what you had before but, in addition to that, I do think that the testimony of Mr. Palewicz's witnesses as to his usual practice should be given some consideration with respect to this, and the mere fact that it does not say affirmatively that it was shown to the witness and he adopted it as a substantially verbatim statement, I respectfully submit does not dispose of the matter. I don't want to re-argue that, of course.

JUDGE HINKES: Let me see the document.

MR. MATHIAS: I would like to note that Mr. Palewicz, in questioning on the record under oath, stated categorically that he did not follow the procedures that Mr. McInerney is referring to in this instance.

I will turn the statement over to you.

MR. McINERNEY: I afforded Mr. Palewicz the courtesy of not putting him under oath. I said at the time I didn't think it would make any difference whether he stated it under oath or not.

MR. MATHIAS: I apologize about the oath. I was in error, then.

JUDGE HINKES: Let me, first of all, quote the language in quotation marks.

First, "Going gets rough."

This is an expression apparently used by Mr. Minkler

Next, "Shook up."

Again, apparently an expression by Mr. Minkler.

Again, "That is all"; the next word "double"; then the words, "that is ~~gone~~ going from $400,000 to $800,000."

Then this quotation:

"There is a competitive bid here which if we don't meet we are out."

Then a quote, "I think you are okay. I think you are right on the beam."

Then a quotation once again, "Get it (glass gallon jugs) out of there and give me prices on the $800,000 yield and don't introduce any other items not in the original quote."

Then there is a passage referring to a conversation between Minkler and Schmidt. Minkler is quoted:

"We are extremely conscious of the legal aspects in a situation like this. We are meeting a competitive price in your possession. Our position is that we have met a competitive price."

Schmidt is quoted:

"I get your message. I read it loud and clear. Ralph, you haven't a thing to worry about. I understand you are meeting a competitive price. Just don't worry about it."

The statement of Minkler:

"We are not dedicated to efficient handling of milk."

And Schmidt's statement:

"That puts you on the beam."

Now, those quotations which are found in a document consiting of nine single-spaced typewritten pages are but very, very small proportion of the total document. In every instance, it is prefaced with Minkler said or Schmidt said or Carr -- I think they mean maybe "Carr said". I don't know.

The document, itself, is clearly the product of the attorney who is reciting what happened in a conversation.

Again, there is nothing in this report to show that the witness saw it or read it and at the end thereof there is the statement:

"No part of this report has been shown or read to informant and informant has not approved or adopted same in whole or in part."

Under these conditions, my rulings with respect to interview reports are controlling and this is not a document to which you would be entitled, Mr. McInerney, for cross-examination purposes inasmuch as your use would be to impeach the witness, to attack his credibility and to show contradictions, and he would be confronted with a statement made by Mr. Palewicz~~'s~~ as a witness and asked to explain its contradiction with what he, himself, may have testified as to what Mr. Minkler testified, a most unfair procedure.

MR. McINERNEY: Your Honor, I submit that it is far more unfair to a respondent to be faced with a charge eight years after the event on the basis of testimony that must be hazy as to recollection when there is in existence a document much closer to the time at issue. I am not sure

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what the date of that report is.

JUDGE HINKES: It's Mr. Palewicz's document. Question him. It is not Mr. Minkler's. That is the whole issue here. This is not Mr. Minkler's. He has not seen it. He has not adopted it. It may be all wrong as far as Mr. Minkler is concerened. But for him to try to justify a discrepancy between this document and Mr. Palewicz's witness and his own testimony, that, to me, is unfair. I don't care how old this case is.

MR. McINERNEY: Mr. Palewicz has testified that even though he didn't follow his usual procedure of showing it to the witness in this case that he did try to get it as accurate as possible.

JUDGE HINKES: Of course; of course.

Every interviewer will try to make an accurate report but you cannot confront the witness and have him explain discrepancies.

MR. McINERNEY: Your Honor, I also cannot reconstruct his state of mind at the time and that is why we asked for it on the basis of the exception to the work product rule of Hickman against Taylor.

JUDGE HINKES: No; your request is denied.

That is the only statement you have now; is that correct, Mr. Mathias?

MR. MATHIAS: That is the only one that Mr.

McInerney doesn't already have.

There was a deposition -- a transcript; not a deposition -- an investigational hearing transcript, and that was turned over to Mr. McInerney prior to the deposition in December of 1971.

JUDGE HINKES: Very well.

We will resume, then, tomorrow at nine-thirty.

(Whereupon, at 7:13 p.m., the hearing recessed, to reconvene at 9:30 a.m., Wednesday, June 13, 1973.)

BEFORE THE

FEDERAL TRADE COMMISSION

IN THE MATTER

OF

THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INCORPORATED;
BORDEN, INCORPORATED.

DOCKET NO. 8866

Room 7312, 1101 Building,
11th Street and Pennsylvania
Avenue, N. W.,
Washington, D. C.
June 13, 1973.

Met, pursuant to recess, at 9:30 a.m.

BEFORE:

HARRY R. HINKES, Administrative Law Judge.

APPEARANCES:

JOHN J. MATHIAS, EDWIN R. SOEFFING, ANDREW G. STONE, RICHARD A. PALEWICZ, and ELIA WEINBACH, Attorneys for the Federal Trade Commission.

DENIS McINERNEY, JOSEPH P. FOLEY, IRA DEMBROW, and THOMAS F. CURNIN, Cahill, Gordon and Reindel, Attorneys for the respondent The Great Atlantic & Pacific Tea Company, Incorporated
(1819 H Street, N. W., Washington, D. C.)

H. BLAIR WHITE and WILLIAM G. SCHAEFER, Sidley & Austin, Attorneys for the respondent Borden, Incorporated
(1 First National Plaza, Chicago, Illinois, 60670).

PROCEEDINGS

JUDGE HINKES: On the record.

There has been a request by Mr. McInerney that the interview report which was the subject of some discussion last night and which was prepared, apparently, by Mr. Palewicz of the Commission following an interview with Mr. Minkler of Borden who was the witness on the stand at the time. Mr. McInerney requested inspection of that document, contending that it was a statement of a witness and that he would be entitled to examine that document and use it, perhaps, in cross-examination of the witness.

I denied the request, holding that it was not a statement of the witness, but a statement of the interview, and, consonant with an order I had issued earlier with respect to such interview reports, it was not available to opposing counsel as a Jenck's Act statement.

Mr. McInerney now has requested that this particular document be kept as a record inthis proceeding, whether he is entitled to see it and to use it, so that a reviewing body will be able to consider the ruling that I made in connection with denying him the use of that document.

It has been agreed that the document will be marked as a Commission exhibit; it will not be offered in evidence; and it will be rejected by me as a document which is not appropriate to be used as evidence in this proceeding.

Furthermore, although it will thereupon be put into the rejected file, it will not be treated as an ordinary rejected exhibit which is available to all counsel. It will be marked secret and confidential, and it will not be available to anyone except the reviewing body, that is to say, myself as well as any appellate tribunal and complaint counsel. It will not be revealed, unless my ruling is overturned, to anyone else.

Does that express your understanding adequately?

MR. McINERNEY: Yes, Your Honor. Thank you.

I believe Your Honor sufficiently identified the document yesterday.

I would like to mention that at a previous session withJudge Shroup we understood that it was dated October 7, 1967. I just wanted to put that in the record.

MR. MATHIAS: Your Honor, maybe I could put a brief -- I will have to identify it. I can make a brief identification for the record and see if that satisfies counsel.

JUDGE HINKES: All right.

Let's first mark it, then.

MR. MATHIAS: Mark for identification Commission Exhibit 161-A through I, --

JUDGE HINKES: Is that 261?

MR. MATHIAS: 261. Excuse me.

-- 261-A through I, consisting of an interview report of an interview conducted on 10/27/67, of Ralph R. Minkler, in the presence of Joseph H. Groves, attorney. Borden Legal Department, and H. Blair White, attorney, law firm of Sidley and Austin, Chicago, Illinois, period.

The interview report was conducted at the offices of the Borden Company on 221 North LaSalle Street, Chicago, Illinois.

The date of the preparation of the interview report is indicated at the end as being 11/6/67.

JUDGE HINKES: Thank you.

That report will be rejected, will be put into the rejected file. It will be sealed, and marked secret and confidential, available only on the terms I have stated before.

xxx (The document referred to was marked Commission's Exhibit 261-A through I for identification, and rejected.)

MR. MATHIAS: Off the record.

(Discussion off the record.)

JUDGE HINKES: Yes; put it in an envelope, seal it and mark it and then give it to the reporter.

MR. MATHIAS: We call Mr. Minkler.

JUDGE HINKES: Mr. Minkler will come up, please.

You may be seated.

I just remind you you are still under oath.

RALPH R. MINKLER resumed the stand and testified further as follows:

DIRECT EXAMINATION (continued)

By Mr. Mathias:

Q Now, Mr. Minkler, you stated, in effect, yesterday that on or about November 1st, 1965, that Borden began to supply A&P private label milk and dairy products, under the terms of the quotation which you designated as the final quotation to A&P.

Now, when these sales began, which plant or plants of the Borden Company supplied the private label products?

A Private label products were put up at the Woodstock plant. That's the only place that private label was processed.

Q This is private label for A&P, isn't it?

A Oh, yes.

Q At that time, was Borden in the Chicago area producing private label milk and dairyproducts for any other store or chain?

A They were not.

Q Now, under the distribution system that you described yesterday, I take it that these products were delivered to your various distribution points and delivered from there to various of the A&P Chicago units?

A That is right.

Q And would these deliveries be made to the A&P stores on the --

We will strike that question.

Were you still selling at this time Borden label milk and dairy products to these same A&P stores?

A Yes; we were.

Q Do you recallthe approximate percentage of the Borden label to the A&P label at the beginning of this agreement, sir?

A No.

Q Where the Borden label and the A&P label were being delivered to the same A&P store, would this be on separate trucks or on the same trucks, sir?

A Same trucks.

Q And would these same trucks be delivering products to other customers of Borden in these same areas?

A They would.

Q Did Borden sell milk and dairy products to A&P stores in any area, any other area, of the Chicago district?

A Yes.

Q In what other areas did yousupply the A&P stores?

A Well, the various zones that have been detailed in different exhibits that we have looked at.

Q I meant within other areas within your Chicago central district outside of the Chicago metropolitan area, say the

States of Wisconsin and Iowa; did you serve A&P stores in those states?

A Yes; we did.

Q Did you serve them any private label products in those states?

A We served -- there were very few stores in Iowa that came under this same quotation and were served; yes.

But, other than possibly those stores, the products you supplied to A&P stores in Wisconsin and Iowa were the Borden label stores; is that correct?

A That is correct. Wisconsin is a separate operation. I mean, it wasn't involved in the Chicago quotation at all.

Q That was a portion of your Chicago central district, though?

A That is right, but it wasn't a portion of A&P's mid-western division.

Q Or at least not of its Chicago unit.

A That is the way I understand it; yes.

Q Now, Mr. Minkler, yesterday you stated that following this meeting --

Strike that.

At the time that you began serving the A&P stores in the Chicago unit with private label milk and dairy products, did Borden make a general offer of these same terms and conditions of sale to its other customers in this market area?

A Do you mean of the private label, a general offer of private label?

Q Yes.

A No; they did not.

MR. McINERNEY: May we know what the word "general" means in that question?

THE WITNESS: I would appreciate that question, sir, too.

MR. MATHIAS: To your other customers, to all of your other customers in this market area.

THE WITNESS: Pardon me.

When you say "general", I would assume that you mean all, pretty much.

By Mr. Mathias:

Q Thank you, sir.

A Okay.

No; there was no general offering.

Q Now, Mr. Minkler, you mentioned yesterday that following this meeting with A&P officials in late September, which you described yesterday, in which you tendered the final offer to A&P, that you left the mention of working this out to others in your organization, and that you became occupied with other matters.

What was your principal interest following this meeting with A&P, Mr. Minkler?

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A We were gravely concerned with the impact of this change on our economics. We knew it was going to be a very difficult thing to adjust to, and my concern from then on had to do with figuring out how we might take costs out of our operation that would still preserve a profit.

MR. McINERNEY: Your Honor, I didn't object to that question because I took the word "concern" to mean what was he going to be doing. But I think the witness interpreted it as calling for the operation of his mind as to what he was concerned with mentally, and in so interpreting it I think the question is objectionable and move to strike the answer.

JUDGE HINKES: Well, let's have the question first. Now, restate it and see whether there is an objection to the question as rephrased.

MR. MATHIAS: Do you want me to rephrase the question, Your Honor?

JUDGE HINKES: Yes, to be sure that we know what you are calling for.

By Mr. Mathias:

Q What project, Mr. Minkler, were you involved in following this final meeting with A&P?

A The merging of our district with another district.

Q And why was this to be done, sir?

A To take costs out of the operation.

Q And this was the purpose you were describing earlier -- your earlier answer applied to this activity of yours, of attempting to take costs out of the operation?

MR. McINERNEY: I object tothat and I renew my motion to strike the former answer as calling for the operation of the witness's mind.

MR. MATHIAS: Your Honor, I think that his present answer shows that the witness correctly and responsively answered my formerquestion and that there was no proper objection to the question.

I was asking him in what endeavor he became engaged following the suspension of the negotiations with A&P, and he started to explain the mechanics that he went through and why they were engaged in the process of merging the two divisions of the Borden Company.

The answer is responsive, and I think that it is an important one; and I don't believe it should be stricken.

JUDGE HINKES: I am going to overrule the objection.

The witness will answer.

MR. MATHIAS: Would you re-read the last response of the witness?

(The reporter read from the record as follows:

"Question: What project, Mr. Minkler, were you involved in following this final meeting with A&P?

"Answer: The mering of our district with another district.")

By Mr. Mathias:

Q Whose idea was it, Mr. Minkler, to merge these two divisions?

A I suggested it.

Q And with whom did you discuss the plan?

A I discussed it first with my immediate superior, Jack Pentz, the President of Borden's Food and Milk and Ice Cream Division.

Q So that, this was a matter, then, which required some approval from the New York authorities?

A Yes; indeed.

Q Which division of the Borden Company was your Chicago central district to be merged with?

A The midwest district, headquarters at Columbus, Ohio.

Q And, what was the reason behind this merger, Mr. Minkler?

A Simply stated, to take out a layer of costs.

Q And why did you want to take out a layer of costs?

MR. McINERNEY: I object to that.

JUDGE HINKES: No.

The objection is overruled.

THE WITNESS: To protect a profit position, hopefully.

Q Can you --

A A letter from me to Jack Pentz.

Q Mr. Minkler, yesterday in questioning you concerning Commission Exhibit 62-B, there was some discussion concerning the total figure appearing on this page which is $882,837.

Does the reading of Commission Exhibit 64-A and B refresh your memory as to the meaning of this figure?

A It clearly explains it.

Q I see.

But you have no recollection other than the letter, itself?

A Only in a general sense.

MR. MATHIAS: Move Commission Exhibit 64-A and B into evidence.

MR. McINERNEY: Our position is the same as before, Your Honor. We have no objection at this time.

MR. WHITE: Again I assume this is without the unidentified handwriting.

JUDGE HINKES: Correct.

The exhibit is received.

(The paper referred to, heretofore marked for identification Commission's Exhibit 64-A and B, was received in evidence.)

By Mr. Mathias:

Q Mr. Minkler, I hand you Commission Exhibit 87-A to C

JUDGE HINKES: Mr. Mathias?

MR. MATHIAS: I have just two or three brief questions to ask, and then our direct examination will be completed.

By Mr. Mathias:

Q Mr. Minkler, what was the chief trade name of the Borden Company?

A Chief trade name?

Q Chief trade name. What label; what name?

A Borden's.

Q Just Borden's.

How long had you been associated in your work with Mr. Malone?

A Since -- well, there became a closer association in the later years, but it began back about 1956.

Q And when did the close relationship begin?

A Well, then, when I became President of the Division, in 1965, from then on we worked very closely.

Q And what was your opinion of Mr. Malone's work, sir?

A He was a blessing. He worked from early morning till late at night. He was a great man, wonderful.

MR. MATHIAS: No more questions.

JUDGE HINKES: I think that, everything considered, perhaps Mr. White should proceed with the examination of this witness.

I am informing him, seriously, that, I mean where we have got some things going for us that offset some of this loss of dollar income, that is all.

Q What loss of dollar income are you referring to, Mr. Minkler?

A I am referring to the fact that we have just agreed to a reduction in price to A&P for private label.

Q Sir, I call your attention to the fact that this is a letter dated December 23, 1964.

A Okay, it is still -- all right. We hadn't got to the $820,000 point as yet by a long ways, but we knew we were going to have to reduce our selling price on private label. It was going to cost us something.

Q And you were telling Mr. Archer that there were also some savings that were anticipated?

A That is right.

Q Was there ever a study made up until the time you made the final offer to A&P, or subsequently while you were at the Borden Company, as to what the actual cost was of supplying A&P private label from the Woodstock plant, to the best of your knowledge?

A No time and motion cost analysis, no. Projections, yes.

Q As of what date?

A I can't tell you. During the period of these discussions, Joe Malone put data together.

Q But not as a result of any experience with A&P from

Woodstock on private label?

A It was a projection.

Q I am sorry?

A It had to be a projection, yes, sir.

Q Thank you. Now, do you know of any studies based on actual experience?

A With reference to this?

Q With reference to supplying A&P with private label milk from Woodstock plant.

A No.

Q I believe you told Mr. Mathias that shortly after A&P had accepted Borden's private label quotation, you turned to the project of consolidating Borden's Chicago and Columbus divisions?

A That is right, sir.

Q Now, when did that project first come under consideration at Borden?

A It came under consideration about November 1 -- now that, don't pin me down to the actual day, but about the time that we started delivering private label to A&P which was November 1, 2, 3 or 4, along in there, of 1965.

Q And no consideration or discussions about it prior to that time, is that what you are telling us?

A That is right.

Q What was the expected cost saving from that consolidation?

A I had a broad statement in mind, but this was preliminary

THE WITNESS: I simply don't know.

By Mr. McInerney:

Q Do you have any idea what, if anything, A&P saved as a result of private label?

A No, I do not.

Q You were shown by Mr. Mathias two exhibits which have been offered and received in evidence. One is 18-O, and the other is 21-U, and those are before you now?

A Yes, sir.

Q I think you described both of these as sales tools used to try to convince the customer A&P that it was getting a good deal, is that correct?

A I believe so, sir.

Q Now, the earliest of these is 18-O, dated May 25, 1965, and a later one is 21-U, which says "revised July 26, 1965."

A Yes.

Q Do you know if there was any difference in the prices on which these two quotations were submitted?

A No, I don't know.

Q Well, if there was a difference, would it have been a reduction rather than an increase as to the later document?

A Here is May, here is July, I just have to study it out.

Q Well, I don't want to. The only way that I can do that for you quickly, Mr. Minkler, and I am trying not to take too much time up on this is to ask you to compare, for example, 18C and 21C, that may help.

A 18C, all right, and 21C.

Both of them are based on a Class I price of $4.32.

Q Well, the prices on the exhibit which are marked 21C are either the same as or lower than the prices on ~~180~~ 18C, would you say?

A For -- now, just a minute. On 21C we have three-day, four-day, five-day, six-day delivery.

Q Well, Mr. Minkler, let me pursue another line, because I don't want to take up too much time.

These documents, of course, have numbers in them that can be examined at a later time.

A O.K.

Q Would you look at 180 and 21U?

A 180 and 21U, yes, sir.

Q Now, in the column marked "Borden Gross Profit per Quarter" on 180?

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A Yes, sir.

Q At the bottom of that column is a figure that appears to be nine-tenths of a mill?

A That's right.

Q Now, in the half gallon column it appears to be six-tenths of a mill?

A Now, just let me find it. On the same? I haven't located it. Oh, yes, all right; the six-tenths of a mill.

Q Yes.

A Right.

Q Now, the comparable figures on 210 under "Borden Gross Profit per Quart" show one cent -- no, I am sorry, 19 mills, do they not, under the "Borden Gross Profit per Quart," which compares to nine-tenths of a mill on 180, is that correct?

A That is correct.

Q And on the half gallon, instead of six-tenths of a mill, the figure is two mills gross profit per quart?

A That is right.

Q Now, can you tell us why the Borden gross profit per quart would have increased between May 25, 1965 and July 26, 1965?

MR. MATHIAS: Your Honor, I object. I don't believe a proper foundation has been laid for this question. There is no showing that the figures are comparable in any way. I see many different figures on this sheet. They don't appear to be dealing with the same sales figures.

MR. McINERNARY: You can argue about this later on, Mr. Mathias. I would like to not interfere with the witness' concentration.

JUDGE HINKES: You may continue.

THE WITNESS: I can't give you the reason for this off-hand. It isn't apparent to me.

By Mr. McInernary:

Q Do the figures appear to be talking about comparable items, that is, gross profit per quart~~er~~ in each case?

A Borden's gross profit per quart~~er~~, Borden's gross profit per quart~~er~~, yes, according to the headings.

Q Now, how does that compare with the figure you referred to previously on that, the half gallon? These figures show six-tenths of a mill on the half gallon May 25, 1965, and two mills a half gallon on July 26, 1965. Do those figures appear to be comparable?

A They seem to be covering the same item, yes. That is all I can tell you.

Q And yet in the later quotation it would appear that Borden is making more profits both on the half gallon and in total, is that correct?

A That appears to be right. And I can't tell you why.

Q Can you tell us how this compares, or is it comparable at all, with the figure that you mentioned before about a half-cent a half gallon with respect to the quotation for the Chicago-Calumet area?

A I don't follow your question.

Q Well, I think you told us before that looking at a quotatic on or about February 9, that I believe ~~the item~~ was carried throu to this period of time that we are talking about now. That your anticipated gross profit per half gallon on that quotation was over a half a cent a half gallon. Do you recall saying that?

A No, I don't.

Q Now, the purpose of those schedules that we are looking at, 180 and 21U, were an attempt to convince A&P that they were getting a very low cost, isn't that correct?

A It is a sales tool, yes.

Q Did A&P ever indicate to you or to anyone in your presence how much A&P expected to save in annual savings or otherwise on private label milk?

A I don't recall any such statement.

Q Was any such statement ever reported to you by Mr. Tarr or anyone else?

A I vaguely recall some general statement of a substantial amount, but I don't know what it was. I can't recall the circumstance of it, and I think it was from Gordon Tarr, but it wasn't significant enough to me so that it fixed itself in my mind.

Q Mr. Minkler, at your deposition, at page 287 of the transcript I will just read that, because it is easier?

A Fine.

Q And I hope by it to refresh your recollection.

"Q Did A&P ever indicate how much they expected in annual savings from this arrangement," referring to the private label arrangement.

That was question by Mr. Mathias. And I said to the witness: "Personally." And you said, "Not to me." And Mr. Mathias continued:

MR. MATHIAS: Your Honor, I object to the statement being read intothe record, if the witness cannot identify it.

JUDGE HINKES: I don't think we can have anything taken in the record that has not been received in evidence.

This is a document which is totally unidentified.

MR. McINERNEY: Well, again, Your Honor, Mr. Mathias did this on a number of occasions.

JUDGE HINKES: I am not aware of that. And, if he did, it should have been objected to.

MR. McINERNEY: Well, I didn't, in an effort to expedite things.

I will simply describe it as being the first four lines of Commission Exhibit for identification 44-B.

JUDGE HINKES: Very well.

MR. McINERNEY: Mr. Minkler, any time that you would like a recess, we will be happy to take one.

THE WITNESS: All right. Go right on. Thank you.

By Mr. McInerney:

Q Now, did you feel that it was necessary for Borden to actually meet any competitive offer A&P might have received?

A I am sure we would has to come close to it. Maybe we had a little leeway.

Q Isn't it true that in giving your finalquotation to A&P with respect to private label, that you felt that you did not actually have to meet any competitor's bid, but come fairly close to it, and that would do it?

A Well, the statement that you are making is kind of contradictory.

Let me have the last part of it.

We have got to come fairly close to it. Maybe we have a little leeway, but we have got to be awfully close to a competitive bid.

Q Now, why did you think that you could come in somewhat higher?

A Well, I place some value on the many years of excellent service, if you will pardon me, that the A&P had gotten from the Borden Company. The knew we gave them fine in-store attention, and we know they appreciated it.

Q So that, in making your final offer, you did not believe that you were necessarily meeting the competitive bid, you might have come in somewhat higher, but, however you describe it, somewhat or some little leeway?

A That is the way I describe it; maybe we have got a little leeway, but we have got to come very close to meeting a competitive bid.

Q And, of course, since it was part of your duties as an executive of Borden to obtain the best price youcould from A&P, if you had any leeway you would like to exercise the leeway; isn't that so?

A Certainly, that is so.

Q So, is it fair to say that when you did submit this so-called $820,000 bid, you did not actually believe that you were meeting competition precisely, but were perhaps a little bit above the competitive offer?

A Oh, I wouldn't say that.

I mean, by that time that type of thinking was completely out of my head. Save the business; come in with a price they didn't turn down. We hoped we were meeting competition; we hoped we weren't going beyond meeting competition. That's the state of mind I was in when we got to the $820,000.

Q And you didn't feel that your bid was necessarily meeting the competition; it might have been above it or it might have been below it?

A I think I have alrady answered -- I mean, maybe -- I don't know any other way to put it. I felt we had to be very close to the competitive bid. I hoped we weren't going over. We had no way of knowing, but we were now coming in with a price that, well, I mean, we had -- we were desperate.

Q Let me put it this way: If there was going to be any error on one side or the other, which sid did you want to be on?

A At that point, -- I can't tell you. At that point, I was merely hoping we were meeting competition.

Maybe back there this point that you are making about taking advantage of some leeway because of relationship was more pronounced in the early stages than it was in the latter stages. In the latter stages, we knew that we were in a very dangerous area, we had to get, hold this business.

Q Well, now, at page 361 of your deposition, Mr. Minkler, starting at line 9, you were asked, "Now, in giving your final quotation to A&P, with respect to this private label business, isn't it true that you felt you did not actually have to meet any competitive quote, but only come close to it? In other words, that you had a little leeway with respect to the offer that you might make?"

And you answered, "That is the way both Gordon Tarr and I felt."

Question: "And why was that?"

Answer: "Well, we thought we had a history of a good enough relationship with the A&P customer that they would give us a slight advantage if it wasn't too big." Unquote.

Now, does that help you to recall your state of mind in giving your final quotation to A&P with respect to this private label business?

A I don't -- with the exception of some rearrangement of the words, Mr. McInerney, I can't see that I have been saying anything much different from that. I mean, I have already told you that there was some space in here where certainly in the back of your mind you are hoping that you have a little leeway, so you read it back to me just now from -- I don't know -- two years ago, five years ago, or what the hell it is.

Q Well, this was in December of 1971, Mr. Minkler.

A Well, I think I remembered that pretty well, then.

Q Now, are discounts, rebates, and other allowances to customers, generally public knowledge or published in the dairy business?

A A price schedule is; there is a printed price schedule, yes, that is generally circulated in the business.

Q I am asking about whether, as a matter of general knowledge you would know what your competitors were charging chain store customers, for example.

A No.

Q Is that kind of information rather difficult to come by?

A Yes, sir.

Q And is it, in fact, a rather well-guarded business secret as to what the dairy is offering chain store customers, and, in particular, large chain store customers with respect to allowances, rebates, and so on?

A I believe that is a fair statement, yes, sir.

Q And do the allowances vary as between customers from the same supplier?

A They might.

Q Do they not, in fact, vary considerably?

A They might.

Q Well, did they back in 1964 and 1965?

you read a lot of pages yesterday, 200 to 209, I think, and if you would like to, take your time and read them all again. But the testimony that Mr. Mathias is referring to, I think, appears at page 206 or 260-G, I think it will probably turn out to be.

"Would you read that at lines 22 to 24 and tell me whether, in giving that answer, that you use the term 'any how accounting', that you intended to imply that you use that term with reference to the $820,000 bid of Borden's or any other bid of Borden's?")

THE WITNESS: I seem to be having a lot of trouble recollecting exactly what the conversation was. I had thought of "any how accounting" primarily with respect to the bids that might come in from competitors.

I do presently recall using the term with Elmer, but I confused myself here reading this because it would seem to indicate that at some time or other I was remembering that I used the term specifically in connection with the bid that we developed.

By Mr. McInerney:

Q And what is the truth with respect to that?

A The truth is that I don't intend at all to say anything that isn't true, but I apparently don't remember that well.

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MR. McINERNEY: Would you please repeat the question that I put to the witness before, Mr. Reporter, and I would like you to please concentrate on the question, sir, and give us an answer to it, if you can.

(The reporter again read the question.)

By Mr. McInerney:

Q In other words, Mr. Minkler, when you gave that answer that I used the term "any how accounting", did you mean to imply by that that you had said that the $820,000 bid of Borden was based on "any how accounting"?

A I had hoped not, but that isn't the way this read.

The "any how accounting" concept that I had in my mind through this period was that that is what we expected competitors to use.

Q And, to the best of your present recollection, did you ever tell anyone from A&P, or was anyone from A&P ever advised in your presence that Borden's quotation was based on "any how accounting"?

A To the best of my recollection, we did not tell them that our bid was based on "any how accounting".

Q Thank you.

Now, did you or did anyone in your presence ever tell anyone from A&P that the $820,000 quotation was not cost-justified?

A No; I did not.

Q In your discussions with A&P people regarding private label, did you or did anyone in your presence ever mention the Robinson-Patman Act to Elmer Schmidt or to anyone at A&P?

A No.

Q Is it fair to infer, then, that you did not discuss the legal niceties of the various Robinson-Patman Act defenses with anyone from A&P?

A Well, obviously when you say that a quotation is given to you, based upon a belief that we are meeting a competitive bid, you are certainly talking about a part of the Robinson-Patman Act. But you may not use the phrase, and I do not remember ever using the phrase "Robinson-Patman" in any of these discussions.

Q Now, I believe you have tesified that neither you nor anyone at Borden, as far as you know, ever made a formal cost study to determine what the actual cost would be of serving A&P from the Woodstock plant?

A No, sir; we did not.

Q I think that you also said that you did not tell anybody from A&P that your offer was not cost-justified; is that correct?

A That is right.

Q I believe also that in testifying yesterday you said that in talking to Elmer Schmidt on the occasion of submitting your final quotation to him, your recollection was that you said to him that, this price is being given to you by us on the feeling and belief that we are meeting a competitive bid; we know of no other way to justify this.

Was that because you did not know, you did not have any cost justification at that point in time?

A No; I wouldn't say it was for that reason.

Q Well, you did not know that it was not cost-justified?

A I did not know that it was not cost-justified because we hadn't made a cost-justification study.

Q Thank you.

Now, did you make any sort of an investigation with respect to A&P's, the competitive bid that you understood A&P had?

A None whatever. I wouldn't know how.

Q Well, has it happened that a customer will tell Borden, from time to time, that he can get his milk cheaper somewhere else?

A I am sure it has.

Q And do you sometimes reduce your price in order to meet that competition?

A I can't answer that personally, because I haven't. But I have got suspicions.

Q Well, what I am wondering about, and tell us if you are not qualified or experienced enough to answer it -- I mean nothing insiduous by that, Mr. Minkler; please believe me --

whether you know, whether it is the general practice at Borden, to reduce prices to a customer on the basis that he says he has been offered a lower price, without verifying what that lower offer was?

A Well, now you said "general practice". This, I can't answer. But I will answer this way: That I am sure that on occasion when a customer has said to Gordon Tarr or to one of our representatives, "Look, I can buy milk from So-and-So, at a better price than I am buying it from you", and he produces evidence to prove it, and our man believes it, he comes in and talks to the sales manager, and there is a hassle on it, and there are, I am sure there are, occasions where the price is met, a record is made, and the price is met.

Q And when you talked about evidence, did you refer to invoices?

A Oh, yes.

Q Or the tickets, and that sort of thing?

A Yes; indeed.

Q Now, did anyone from your knowledge ask A&P to produce any evidence with respect to the competitive bid that you spoke of?

A No one did, to my knowledge.

Q Either before or after you had submitted the quotation to A&P?

A No one did at that time, to my knowledge.

Q Did anyone from Borden, either before or after you submitted this final quotation, ask A&P for a letter or a statement in writing confirming that A&P had received a quotation from a competitor that was at least as low as the Borden offer?

A No; not to my knowledge.

Q Did you or anyone from Borden at that time or thereafter inquire whether Borden's prices were lower than a competitor's prices or what the relationship might have been between Borden's quote and the competitive quote?

A Inquire of whom, sir?

Q A&P or anyone else.

A Oh, no. Oh, no.

Q Did you give any consideration to any course of conduct that would assure Borden that it was meeting but not beating the competitive bid?

A We --

I don't know whether your question is general and covers the whole area here.

All we had, as I have testified before, when I gave the final bid to Elmer Schmidt, he made the remark -- well, not the final meeting at the VFW; I am talking about now first -- when he first heard of $820,000, he says, "Well, now you are in the ball park", words to the effect that, "This is where you belong"; "This might work out okay for you."

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A&P, were there such occasions?

A I am sure there were.

Q And you discussed this matter with them prior to that time?

A Yes; I did.

Q Now, I believe you have already told us that neither you nor anyone in your presence ever told A&P or anybody from A&P, rather, that the private label prices offered to A&P would not be made available to other purchasers; is that correct?

A That is correct.

Q Now, would Borden, in fact, have sold private label milk to another customer, for example, Kroger, on the same terms and conditions that it offered private label milk to A&P?

A I believe we would; yes, sir.

Q And, subsequent to this offer to A&P, did you, in fact, or did Borden, in fact, make private label offers to other customers?

A Not to my own personal knowledge.

Q Would you have known if such offers had been made?

A Not noticeably.

Q Now, at the time of your meeting with Mr. Elmor Schmidt, in September of '65, when you submitted this final quotation to A&P, did he ask you to everify in writing that these prices

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JUDGE HINKES: Did you send these letters to Mr. Pentz, Mr. Minkler?

THE WITNESS: Well, I don't recall either of them at all. And, I'm sorry, but I do not. I have no recollection of them. But that's certainly my signature; I concede that.

MR. MATHIAS: Your Honor, I see no basis for the introduction of Respondent A&P Exhibit 2, through their Exhibit 3-A. 3-A just states, here is a copy of the letter delivered to A&P this morning. It makes no description of the letter. The witness states no present recollection of the letter.

JUDGE HINKES: No; the witness said it was.

MR. MATHIAS: Of the letter, but not of the attached letter, the so-called attachment letter, A&P Exhibit 2. The witness has stated he has no recollection of the document, and the only thing he has identified is his signature on the letter to Mr. Pentz, A&P Exhibit 3.

JUDGE HINKES: Mr. Minkler, do you remember signing this letter?

THE WITNESS: No, sir.

JUDGE HINKES: Do you remember it being prepared by anybody?

THE WITNESS: No, sir.

MR. McINERNEY: Your Honor, I don't think the test is whether he has a present recollection of signing the to defend these prices.

The second letter, Respondent A&P Exhibit 3, is signed by you and it is addressed to Mr. Jack B. Pentz, President, Borden's Milk and Ice Cream Company, Division of the Borden Company, New York:

"Dear Jack:

"Here is a copy of the letter delivered to the A&P this morning.

"Cordially,

"Ralph."

Now, do you has any recollection with respect to that letter?

A I am going to tell you. All of this could have been put together by Joe Malone. You denied me the opportunity to say that, but --

Q I didn't deny you the opportunity.

A Well, I felt you did.

I can't recall these letters, but it wasn't an absolute impossibility at all, because it happened from time to time that Joe would write a letter and bring it to me to sign and it would go across my desk that quick.

Q Thank you.

Do you recall anything else about these letters?

A No; I do not.

Q Is there any way that we might refresh your recollection?

Can you think of anything that might help you to recall how these letters came into being?

A Well, I am very sorry; I wish I remembered these letters, but I don't.

Q Well, letters of this nature, presumably from what you have said before, they would have been discussed among you and Mr. Malone and Mr. Tarr; is that correct?

A Well, certainly. We certainly discussed all the development of our prices together; yes. So, --

Q Well, now, is there anyone else that you might have discussed a letter, such as either one of these, with?

A Joe Malone might have discussed that one letter with Joseph Greaves.

Q He is the attorney?

A He is the attorney; yes, sir.

Q Do you know whether he did or not?

A I do not; I do not.

MR. McINERNEY: May we have a short recess?

JUDGE HINKES: Yes.

Off the record.

(Discussion off the record.)

(A brief recess was taken.)

fls.

you to back up even beyond '65. Gordon Tarr developed a strong friendship, and a lot of it was due to the fact that he provided Elmer with a lot of knowledge about the milk business in Chicago, and the milk business generally, that at least Gordon said to me he didn't think Elmer knew until they over a period of time talked about these things.

By Mr. McInarney:

Q And do you know whether he had any experience as a milk buyer prior to these private label negotiations?

A Well, he was buyer before the private label, buyer for milk right in Chicago, before the private label discussions began. I don't know how long he was, but --

Q Do you know whether he had ever had any negotiations for private label milk, for example?

A No, I do not. No, I don't.

Q You don't know whether he did or he didn't?

A That is correct.

Q Now, during the course of your deposition in 1971, toward the end of the year, December, at page 365 of the transcript, you were asked the question:

"Now, in 1965, was Mr. Schmidt also a knowledgeable and sophisticated buyer of milk and dairy products, in your opinion?"

Answer: "Not particularly."

Question: "Had he had much experience in this area?"

Answer: "No, he was rather new in that area." Unquote.

Now, appreciating that your memory may have been better then than it is today --

A Well, that is not too inconsistent with what I have said, is it?

Q Well, I am not arguing with you, Mr. Minkler. I am just trying to get at what the facts are.

A Oh, escuse me.

Q Does that help to jar your memory at all as to what knowledge and sophistication Mr. Schmidt had in 1965, in the area of purchasing milk?

A Beyond what I have already said, I am getting a little lost. Certainly by 1965 he knew, he was beginning to get pretty sophisticated, I would think, by the time we got to the end of the bidding on private label business. And as I have already said, that in an earlier period of time I think that Gordon Tarr did a lot to establish his friendship over there by helping, I guess educate is the word, Elmer, into some of the complications of the milk business.

Q Do you know if Elmer had any other tutors?

A No, I do not.

Q Mr. Minkler, you have testified with respect to these negotiations on two prior occasions, as I recall. One is the deposition that we have been referring to, which was on December 1st or 2nd, of 1971, and the other occasion was in

Q What were your duties as manager, sir?

A Complete stocking of the store; anything that had to be done in the store.

Q Were you familiar with the methods of delivery of milk by the companies which supplied you, specifically Borden?.

A Yes.

Q And when the Borden driver arrived at your store -- let's say we are talking now for the period 1966 through 1970 --

MR. SCHAEFER: Object to the time period, your Honor.

As I understood that, we were limiting this to certain months.

MR. SOEFFING: We will, your Honor, for this period.

By Mr. Soeffing:

Q For the months, let's say October, 1966 through March of 1967, and June of 1969 through March of 1970, did the Borden driver place the milk in the cooler of the store?

A In the back room holding cooler, yes.

Q Did he do anything more than that?

A No.

Q Did he rotate the milk in your display case?

A No.

MR. SOEFFING: Your Honor, if I may have just a moment perhaps we can conclude this very quickly.

By Mr. Soeffing:

Q Mr. Barney (sic), I believe you gave us a business address of 740 -- 7440 Calumet Avenue in Hammond?

A Yes.

Q Was that the Model Food Store Center, Inc.?

A Yes, it is.

MR. SOEFFING: Thank you.

No further direct examination of the witness, your Honor.

JUDGE HINKES: Mr. Curnin.

CROSS EXAMINATION

By Mr. Curnin:

Q Mr. Peters, you were asked about delivery conditions between October of '66 and March '67; do you have a clear understanding of how the deliveries were made back then, which is now seven or eight years ago?

A Well, our store is relatively small, and me being the manager, and probably at that time I am sure at that I had one other person working with me, and I did anything from stocking any shelf in the store to receiving merchandise in that back door, and generally speaking, JUDGE HINKES: You may continue.

MR. CURNIN: Would you read back the last question, please?

(Question read.)

THE WITNESS: My methods don't change.

By Mr. Curnin:

Q But what about the methods of the Borden driver; did they change, sir, because really, that is what we are talking about, what the Borden driver did, and as separate and apart from the, your method of operation.

A At that time I -- I know the driver personally, and the milk was brought right into the cooler.

Q All right.

Now, when he brought it into the cooler during this period of time, did he rotate the stock when he brought it into the cooler?

A In the cooler, yes.

Q He did.

And that, he did that both in the October-March period to the June '69-March '70 period?

A This is my method, when any milk man brings milk in, he pulls what is in the far part of the cooler forward --

Q Right.

A -- and puts the new milk in the back.

Q All right.

Now, were there ever occasions during this period of time, for anyone of a variety of reasons, where the driver took some of the milk up to the dairy case?

I am not talking about stocking or anything, but just --

A Oh, yes.

Q Now, were there ever occasions during this period, October to March '67, and June '69 to March '70 when the driver, for reasons of cooperation or otherwise, or maybe because you knew one another, did he ever put milk in the case?

A No.

Q That did not occur?

A That did not occur.

Q All right.

But the others did that I have mentioned, rotating the stock and bringing it to the case, but not putting it in the case?

A Yes.

MR. CURNIN: Thank you, sir.

JUDGE HINCKES: Is there anything else, Mr. Curnin?

MR. CURNIN: No.

JUDGE HINCKES: Mr. Scheafer?

Chicago office?

A Northern Indiana, the northern part or maybe down around La Salle, Illinois, on out into the Rockford area up to about the Wisconsin line and a little small piece of southern Michigan.

Q How long had you held the position as office manager of this office, sir?

A Oh, around 1966 I was appointed.

Q Do you recall the approximate month in 1966?

A It was around the middle of the year.

Q June or July?

A August, I believe.

Q August of 1966.

A Yes.

Q Now, sir, as office manager what were your duties?

A To supervise the office. The Chicago office had an ice cream plant in operation. They had no milk. The milk operation was handled by people at the delivery location with the exception of centrally billed accounts which we handled in our office so there was an office at that time at Hammond, Rockford, Elgin, and O'Hare, and I don't know whether there was a South Side branch in existence at that time or not. It has been closed and my memory just doesn't tell me that the Holland Road, as we called it, was in existence then or whether it had been closed, but there was either one or two Chicago distributing branches.

Q As office manager did you state that you handled the central billing -- your office handled the central billing for all of these branches?

A That is correct. The general breakdown of who was doing the billing and who wasn't was to it if the branch handled that account exclusively if multiple branches were distributing products to a customer.

Q In other words, such as A&P?

A Such as an A&P.

Q Any customer that had stores in more than one branch?

A Yes.

Q How long had you been employed by the Borden Company prior to August of 1966?

A I started with Borden July 1935.

Q And what was your position just prior to the time you became office manager, sir?

A I believe I had the title of budget director.

Q And how long had you held that position, sir?

A 1962 in that area.

Q Have you always been in the administrative end?

A I have always been in the accounting end.

Q Now as such, Mr. Rouse, were you familiar with the records kept by the Borden Company in the ordinary course of its business?

A I was familiar with the accounting records, yes, sir.

Q Now, Mr. Rouse, did you appear in Chicago, Illinois, on

November 19, 1970 in response to a subpoena duces tecum of the Federal Trade Commission issued to Borden, Incorporated, in connection with File No. 6710149? Do you recall such an appearance, sir?

A I do, sir.

Q I hand you ---

MR. MATHIAS: Mark for identification a document entitled "Supp. Duces Tecum, United States of America, Federal Trade Commission to Borden, Incorporated, to which is attached several pages with the heading on the first page, "Specifications" and as the last two pages a restitution of the Federal Trade Commission directing an investigation into the acts and practices of the Borden Company and the Great Atlantic and Pacific Tea Company, Incorporated, file No. 6710149. Mark this as Commission Exhibit 264A through H for identification.

(The documents referred to were marked Commission's Exhibits 264A through H for identification.)

By Mr. Mathias:

Q I hand you, sir, Commission Exhibit 264A through H and ask you if you can identify this document.

A This is a document I used to assemble certain records that you people wanted.

Q And this is the document to which you were responding when you appeared in Chicago on November 19, 1970, at an investigational hearing of the Commission?

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A Yes, sir.

MR. MATHIAS: I offer 264A through H in evidence.

JUDGE HINKES: Is there any objection?

MR. FOLEY: I object. There is no relevancy to this proceeding.

MR. MATHIAS: Your Honor, there is a question of the authenticity of various documents which subsequent questioning expected to show were produced in response to this subpoena by Mr. Rouse and I believe that with that explanation and since the question of authenticity has been specifically raised by respondent A&P, that this document does become relevant to this proceeding.

JUDGE HINKES: I will overrule the objection. The document is received.

(The documents, heretofore marked for identification as Commission's Exhibits 264A through H, were received in evidence.)

By Mr. Mathias:

Q Now, Mr. Rouse, calling your attention first to Specification 6 of that subpoena, for the sake of convenience since I believe we proceeded in this manner on November 19, 1970, I would like to start with this particular specification.

Now, Mr. Rouse, how did you first receive a copy of CX-264?

A I don't recall. It was given me or mailed to me or something. I don't recall.

Q Well, when you did finally receive a copy prior to the date in which you appeared before the Commission?

A This is correct.

Q When you received the copy, what were your responsibilities in connection with it, sir?

A Well, I was given the responsibility of responding to these requests. Assemble the records and get them down there.

Q And what procedures did you follow in order to comply with this request, sir?

A Well, I directed the people under me to go to the places where these things were filed and get them so they would be available to turn over to you.

Q And was this work done under your supervision and control, sir?

A Yes, sir.

Q Now, sir, referring to Specification 6, which calls for the period November 1, 1965 through March 31, 1966, all route books and rebate check registers for Borden's O'Hare route in the Chicago, Illinois, metropolitan area, what documents did you return in response to that specification, sir?

A Well, you have them. That is a sample of them there of the route books ---

MR. FOLEY: I move to strike the witness' statement you have them. There is no foundation laid at this time that he knows that Mr. Mathias has them.

JUDGE HINKES: Are you questioning the veracity or his honesty? What do you mean?

MR. FOLEY: How does he know that Mr. Mathias has what was subpoenaed in November 1970?

JUDGE HINKES: He has testified that Mr. Mathias has the documents which he collected. Now I presume that this is based upon personal knowledge. Did you give it to Mr. Mathias?

THE WITNESS: Mr. Mathias was at the meeting and the books were turned over to the FTC. Now to get technical, the FTC has them, to my knowledge I gave it to them.

MR. FOLEY: That is correct, that is my point, Your Honor. The witness gave documents to the FTC. That is what he knows. What happened to those documents remains to be established.

JUDGE HINKES: I think the observation is really kind of ridiculous, Mr. Foley. This witness gave the documents to FTC. Mr. Mathias is counsel for FTC.

MR. FOLEY: I am not objecting that he gave the documents to Mr. Mathias.

JUDGE HINKES: What then is your point?

MR. FOLEY: I am objecting to the statement that Mr. Mathias has the documents now.

JUDGE HINKES: That is this witness' conclusion. Perhaps he is wrong, but the statement stands. As far as he is concerned, that is his impression and we can go on from that point. I don't know what sort of a mountain we are raising out of this mole hill.

By Mr. Mathias:

Q Mr. Rouse, was I the attorney for the FTC to whom you turned over the documents pursuant to this subpoena?

A That was my impression. I didn't examine your credentials, but you were the attorney and I believed this to be true, yes.

Q Now, sir, I hand you three copies of documents showing with 19 February '66, with 18 February '66, and with 20 March '66. I hand you these documents and I refer to your left two cartons full of similar documents. Do these appear to be the documents you turned over to me on November 19?

MR. FOLEY: Your Honor, I object at this time unless the documents are marked for identification in order that the record may be clear.

JUDGE HINKES: The objection is overruled.

MR. MATHIAS: Your Honor, I would like to note that each of these documents contains on its front page a marking Federal Trade Commission Exhibit No. 68 in the case of ~~with 19~~ W-19 February '66 and similar markings appear on the other two booklets as well as each and every one of the documents in the two cartons.

MR. FOLEY: There is no way, Your Honor, for a transcript to reflect what documents are in those cartons about which the witness is going to be asked to give some testimony.

JUDGE HINKES: Perhaps he will be asked, perhaps he will not. At this point this is merely identification just like the witness taking the stand and being asked do you see the robber in this courtroom? Does this witness see the documents that he supplied in this courtroom? That is the identification, that is all. And I presume that the answer to the witness is that does or let me make it more clear.

Mr. Rouse, you handed over a number of document, you say, to the Federal Trade Commission and under the impression at the time that Mr. Mathias was the attorney for the Federal Trade Commission, is that correct?

THE WITNESS: Yes, sir.

JUDGE HINKES: Do you see those documents here or some of them?

THE WITNESS: I see documents that look like they are and I see that these three are identified, so I would say that they are the documents.

JUDGE HINKES: Very well, let's go on.

By Mr. Mathias:

Q Mr. Rouse, the Specification No. 6 calls also for rebate check registers. I hand you a series of documents which are marked 88 with various numbers, 1 through -- there are a great number of subparts. I will put it that way. One of these is marked as Federal Trade Commission Exhibit No. 88 on the back and shows the File No. 6710149 and the date 11-19-70. Witness

Rouse, the reporter's initials is JB.

Now, Mr. Rouse, I hand you this stack of documents and ask you if this is the set of documents which you returned in response to that portion of Specification 6.

MR. FOLEY: Your Honor, once again respondent A&P objects. There is no foundation laid by which this witness can answer that question. There has been no connection made or established at this hearing between these documents and the documents that the witness returned in response to the subpoena in November 1970. There has been no connection made and no showing he ---

JUDGE HINKES: Well, isn't that what the witness is being asked? Would you read the last question?

MR. FOLEY: Your Honor, he can't do that, if I may. When he submits these documents to Mr. Mathias and Mr. Mathias takes the documents and brings them back here two years from the time he receives them, how is the witness expected to know that those pieces of paper in front of him are the same pieces of paper?

JUDGE HINKES: That is exactly what he is being asked.

MR. FOLEY: I submit unless there is some -- those documents have been stamped by Mr. Mathias. Someone else can establish the fact that the same documents handed by the witness to Mr. Mathias are these dockets, but this witness cannot say that.

JUDGE HINKES: Why can he not? Is he blind so that he cannot read the document and remember the reply looking at it?

MR. FOLEY: He doesn't know that, Your Honor.

JUDGE HINKES: Does he not know that.

MR. FOLEY: Judge, if I received a piece of paper or I gave you this piece of paper and two years from now you were asked is this the piece of paper Mr. Foley gave you, how do you know?

JUDGE HINKES: Believe me, if I didn't think that, I should be removed from my job. If I can't remember something that happened two years ago, I shouldn't be presiding over this hearing.

MR. FOLEY: Unless there is some identification on this document by which you can testify that you know that that piece of paper ---

JUDGE HINKES: The objection is overruled. I think this is really fatuous. Let's go on.

THE WITNESS: Well, they are Borden records that appear to me to be the ~~bonds~~ forms that I handed over to Mr. Mathias.

By Mr. Mathias:

Q Now, Mr. Rouse, from where were these route books and rebate check register forms obtained?

A Well, the route books were obtained from the branch at which the routes operated, in this particular instance O'Hare. The rebate forms were obtained from the files in my office

JUDGE HINKES: On the record.

By Mr. Mathias:

Q Mr. Rouse, before the break we were discussing Specification 4 of the subpoena which involved the period January through March of 1967 and involved certain A&P stores and other stores in the Gary and Hammond area. Now I show you, first of all, a group of pink invoices, all of which appear to be to A&P stores in either Gary or Hammond area during this period of time and ask you if you can identify these as being the documents you returned in response to Specification 4, that portion of it dealing with A&P stores.

A These are the A&P invoices that appear to be in that sequence.

Q And I now show you documents marked "Invoice, The Borden Company" and addressed to various stores, also appearing to be during this period of time up through from January through March of 1967 and ask you if you can identify these as being the invoices returned for the other stores under Specification 4.

A Yes, sir. These are the invoices.

Q Now I hand you a series of check register receipts with the Borden logo at the top, which appear to be all issued in either February, March or April of 1967, and ask you if these are the rebate records which you returned in response to Specification 4 in November 1970.

MR. FOLEY: Respondent A&P objects on the grounds that there has been no establishing that the witness can answer the question.

JUDGE HINKES: Overruled.

THE WITNESS: They are the Borden records that were submitted. Whether they are complete or not, I don't know, but they are Borden records. I am sure they are the ones I submitted.

By Mr. Mathias:

Q Wherein you say whether they are complete or not, what do you mean?

A Well, there is an indication that it passed through other hands. I don't think they are incomplete, but they did get out of my hands.

Q In other words, at that time in 1970 you turned over all of such records that Borden had?

A That is correct, and if you have shown me all of those records that I turned over, they are all here.

Q Now, Mr. Rouse, I would like to refer you to Specification 3 of the subpoena which for the period October 1, 1966 -- strike that.

Going back momentarily to the check register receipts which you have just previously been referred, I note again that the period of time covered by Specification 4 is January through March of 1967, whereas the checks are dated February through April of '67. Can you explain why this is so, sir?

A The check is dated the date that it was issued and covers the previous accounting period.

Q That would be the previous month, sir?

A That's right. Sometime in this period we went under 544 and a previous month could be if the account was billed on a weekly basis, it could be four or five weeks. If it was billed on a monthly basis, it would be the month. In other words, we didn't attempt to ~~submit~~ split weeks in working up the rebate.

Q Now, Mr. Rouse, I would again return to Specification No. 3, which covers the period October 1, 1966 through March 31, 1966 and request invoices which are rebate records and/or other books and records showing for each product in size and style of container (a) net prices and (b) unit volumes of sale of fluit milk and other dairy products delivered to the stores listed below and then the list of all A&P stores located in Valparaiso, Indiana, and (b) the Joe ~~Teitel~~ Tittle & Sons store located in Valparaiso, Indiana.

JUDGE HINKES: You said October '65 through March '66.

MR. MATHIAS: I meant through March '67. I am sorry, sir. That was my error.

JUDGE HINKES: Very well.

By Mr. Mathias:

Q Now, Mr. Rouse, I hand you a series of pink billing sheets which have at the top the Borden Company and list as the customer name A&P Store [illegible] at the address of [illegible] S Calumet Avenue, Valparaiso, Indiana, and ask you if these are the A&P invoices which you returned in response to this specification.

A Yes, sir, these are.

Q Now I also hand you a series of invoices of the Borden Company listing the customer as Joe ~~Teitel~~ Tittle & Sons, 1307 Lincoln Way, Valparaiso, Indiana, and ask you if these are the invoices which you returned showing the billings to the Joe ~~Teitel~~ Tittle Store in Valparaiso under this specification.

A They are.

Q Now, Mr. Rouse, I note that the record -- nor do our documents indicate any further documentation in response to this subpoena specification. Can you explain why this is so, sir?

A Specifically can we go over the further documents you have reference to?

Q Well, I note that the specification calls for invoices, rebate records and/or other books and records showing for each product and size and style of container (a) net prices and (b) unit volumes of sale. Now in response to the Specification 4 in connection with the customers other than A&P, you returned certain check register forms.

Now in connection with Specification 3 there were no check rebate check regist er forms submitted.

A Well, that would indicate to me that this was a net billing

Q That is that both the A&P store and ---

A ~~Teitle~~ Tittle net billed.

Q If there had been any records of the Borden Company, they would have been returned under this specification, sir?

A Yes, sir, they would have been and I could find none, so there weren't.

Q Now, Mr. Rouse, I would like to refer you to Specification 5 of the subpoena appearing on CX-264D. This specification covers the period June 1, 1969 through March 21, 1970, and calls for invoices, rebate records, and/or other books and records showing for each product and size and style of container (a) net prices and (b) unit volumes of sale of fluid milk and other dairy products delivered to the stores listed below.

Now included below under the first heading are all A&P stores located in Hammond, Gary, East Gary, Valparaiso, Highland, Munster, South Bend, Elkhart, and Mishawaka, Indiana. And there are a number of other stores located in various communities in the State of Indiana.

Now, I hand you a series of pink Borden documents marked showing the customer's name in each instance to be various A&P stores located in various Indiana communities and ask you to look through this stack of documents and tell me, if you can, if these are the dockets which you returned in response to Specification 5(A) of this subpoena.

MR. SCHAEFER: Your Honor, if I might interject while the witness is looking there, I assume that this line of questioning dealing with the 1969 and '70 documents is not directed to Count 3 of the complaint.

MR. MATHIAS: No, Your Honor, it is not.

THE WITNESS: Those are the documents I turned over.

By Mr. Mathias:

Q Now, Mr. Rouse, I hand you a series of white billing forms marked "Invoice, Borden, Inc." and showing various customers' names in various Indiana communities for the various months covered by this specification, that is, June 1969 through March 1970, and ask you if you can identify these documents as being the invoices which you returned in connection with the other customers listed in Specification 5 at the November 1970 subpoena return.

A They are.

Q And now, Mr. Rouse, I hand you copies, what appear to be photocopies of various check register forms, dated from July 1969 through April of 1970 and addressed to various customers in Indiana communities and ask you if these are the rest of the records which you turned over in response to Specification 5 at the November 1970 subpoena return.

MR. FOLEY: Your Honor, I would object to that question. The witness cannot possibly answer it as to whether these documents that he has in front of him are, in fact, the same documents that he turned over to complaint counsel over two years ago nor can he say whether the pile of papers in front of him constitute all of the papers that he turned over and that he not been established through questioning.

JUDGE HINKES: Well, as to whether or not this witness can state that these are the documents, I see no reason to question the veracity of his answer and if he answers that he can, that is that. As far as being the same documents, we will find that out in due course. So far he is only being asked whether these are the documents that he submitted and I think we can explore the possibility as to whether or not they are all of the documents or not.

You may answer.

THE WITNESS: I think I qualified my deal once before, that whether they are all here or not is impossible for me to say, but these are the type documents and they look like the documents and I would say they are the documents I turned over to you in response to this subpoena.

By Mr. Mathias:

Q Now again your only question as to completeness as to whether or not somebody may have removed something?

A Somebody may have goofed. Borden goofed. We didn't respond to all of it because we couldn't find certain things.

Q But to the best of your ability you searched the Borden records and these were all that could be located?

A That is all and I am sure you people have done the same. When I gave it to you, you kept them ----

MR. FOLEY: I move to strike.

THE WITNESS: And I think it is human to believe that these are the ones I turned over to you.

MR. FOLEY: I move to strike the witness' speculation.

JUDGE HINKES: That is an opinion. That portion will be stricken.

By Mr. Mathias:

Q But every effort was made by you as the supervisor on this project to obtain all of the rebate records for these various customers.

MR. FOLEY: I object to the vagueness of the phrase "every effort."

JUDGE HINKES: Overruled.

THE WITNESS: I took all effort that I thought was reasonable. In other words, I felt that I exhausted the possibility of finding any further records. We went to the place where they should be filed, we got most of the information and then we tried to find the stuff that was missing. You get into an area that things get misfiled and they are removed at times for good reason by proper, you know, people authorized to see them and they get overlooked.

I made the effort that in my mind responded to this request. I urged my people to do the same.

By Mr. Mathias:

Q Mr. Rouse, now I would like to call your attention to Specification 9 of the subpoena which calls for the period knowledge of it.

Q It is not a record kept in your office, sir?

A Not a record kept in my office. It is not an accounting record. I have not seen this type of record before.

JUDGE HINKES: Were the documents that the witness spoke of just a moment ago documents kept in his office, the ones that were compared to the pink forms?

THE WITNESS: These were issued by the Columbus office as shown by Columbus, Ohio, Code 12. They issued them on authenticated request for checks coming out of a branch that would go down there and they issue this check.

JUDGE HINKES: I understand. But now the form itself is not a check, is that right?

THE WITNESS: It is a copy of a check.

JUDGE HINKES: It is?

THE WITNESS: This is a copy of the check that is actually issued and this is a copy of this form or one of the other forms.

JUDGE HINKES: All right. Now that form, then, where is it kept?

THE WITNESS: Which one?

JUDGE HINKES: The pink one or the --

THE WITNESS: That woud be in the Columbus file. In other words, if they issued the check they would have it there. If I issued the check I would have it in my office.

JUDGE HINKES: I see.

By Mr. Mathias:

Q Now, when you obtained these pink slips, is that where you obtained the rebate data from?

A Well, the set-up we have is that some time during this period early in the period Borden further consolidated their accounting functions and one of the things that they consolidated was the issuance of checks which went down to Columbus, Ohio.

Now, the status of that insofar as Chicago region was concerned was that they were performing a service Bureau function for us. Well, I always looked at it this way, that they were part of the accounting facilities I had at my disposal to accomplish --

Q This was a part of the unit under which you worked, the Borden Company?

A Well, they were a part of my accounts payable department. We still had a small accounts payable department for emergency purposes but the purpose of the consolidation was to get the clerical work down in one place and accomplish whatever ef efficiencies that would give us.

Q And now I think what the Examiner is asking is when you obtained these check copies in response to the Commission's subpoena which files did he obtain them from?

A I had to request them from Columbus.

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Borden Company?

A That is correct.

Q Now, is this document a copy of an entry in a ledger or other book maintained by the Borden Company which would indicate all of the check requests received by Borden Company for or on or about November 7 or 9, 1966?

A Well, this is the form that is used to provide a means for the Hammond branch in this instance to request checks to these customers and it was our practice that all of them should be on here. Now if he forgot one or something came up after this was prepared, there could be others, but in the normal business practice we expected him to have his entire expense on here so that we could get it in the records and determine our operating position.

Q Would this document 267A reflect all the checks paid by the Hammond branch of the Borden Company or paid on behalf of the Hammond branch of the Borden Company to customers on November 7, 1966, is that correct?

MR. MATHIAS: Your Honor, now I think the question is awfully broad. He is the one who is bringing in other products possibly and other bases for issuance of check.

MR. FOLEY: I will narrow the question to confine it to milk products.

THE WITNESS: This should be. This should be

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w19 would you explain how we could determine the net price after all discounts, deductions, rebates, and so on, that any one of those customers paid for milk products?

A Well, the sales that were billed by the office, we called it dropped out of the route book. In other words, it had to be dropped out at the same price the man was charged so he could settle the account with the driver. Then at that point we would pike it up on an invoice for the period covered by the billing, whatever the agreed terms were, weekly or monthly or semi-weekly. Then we would apply the price supplied by the sales department, and there were some that net billed and that invoice was relatively simple.

You would extend your quantities and get an amount and send theman the bill and hope he paid you.

Then there were some that were billed at list price, and here you would send the bill, and he would make settlement, and then in settlement of your agreement with him you'd draw a check for whatever the agreement was and send him the check or deliver it to him.

These were the two overall general practices. There were some where a man would be on list price, but for some reason or other he would get into a competitive jam and my understanding is that for competitive reasons, why, there could be adjustments made to the bill that was presumably sent at list, and here again a check would be drawn and would be on the sales expense or on the request for sales expense.

Q All right. Now let me ask you at that point then, so that I understand, if there were some special arrangement with the customer of the type to which you have referred on billing, is what you are saying that the discount, the special discount might either be taken off the invoice that was sent to him or it might be given to him in the form of a rebate check? Is that correct?

A That is right. I didn't check that out of there. There probably were, and I'd have to see the invoices -- there probably were invoices where the agreed discount was taken off after being billed at list.

In other words, I take your question, there could be a customer billed at list price and he was on an agreed 10 per cent discount, the discount could be right on the invoice sent to him.

Q Rather than on a rebate check?

A It could be. There undoubtedly was some, if he didn't want the check, why,we wouldn't do it. In other words, we would conform to the customer's wishes if that was his desire.

Q All right then, Mr. Rouse, just to make clear -- this was the concern that I had from your testimony this morning -- for such a customer in order to determine the total discount that he was getting or alternatively the net price he was paying, you would have to review the route book, the invoice, and the rebate check copy, is that correct?

A Yes. The route book would be the transaction between the company and the routeman and the company and the customer in the case of cash sales. In the case of office billed sales the route book would merely reflect the transaction between the company and the routeman. To get from that point to the customer you would have to get the invoice.

MR. SCHAEFER: Thank you, sir.

I have no further questions.

By Mr. Foley:

Q You made reference to making up the bill and sending it out to Borden's customers and hoping they'd pay. Did all Borden customers pay their bills to your knowledge?

A We had bad debt experience.

Q Do you know what that bad debt experience is?

A No.

Q Can you tell us approximately how much of Borden's billings were not paid?

A I wouldnt hazard a guess. In my capacity I was informed X per cent of sales to apply, I don't even recall what it was, and we set that up. Now, how that was depleted by writeoffs, I don't know.

Q All right. Mr. Rouse, with reference to the Borden route books, in the box in the corner for the O'Hare route, market to see if there is anything in there and that should do it. If the checks were issued, it should be in the discount file or where we kept those things which we kept separate or else in his individual file if there was any other type payment.

Q I show you 267A through C. Is that one of the types of documents to which one would look in order to secure payments made to the customers?

A Yes.

Q Another type of document is the check copies, is that correct, Mr. Rouse?

A Well, the check copies would be prepared if here. Now this isn't the only thing that will originate or trigger an issuance of a check copy. There are other requests that will do this, but this was designed to cover this type of payment.

Q By this type of payment you mean --

A Rebates.

Q But other payments to Borden store customers not considered by the Borden Company to be rebates, such as an interest payment or other payment of that nature, would not be reflected on documents such as Exhibit 267A?

A It should not be on that type form.

Q What department of the Borden Company, if you know, would possess records of those other payments?

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A Frankly, I don't know of any, and I can't say that there is not any, but if there is, they are darn few. I can't recall --

Q No; my question is: Do you know what department of the Borden Company --

A The accounts payable.

Q Is that your department?

A No, I am not with them anymore.

Q Well, was it?

A Yes, it was under me except the one in Columbus and that was an arm of mine, I guess you termed it.

Q The accounts payable department in Columbus would have such documents for stores in the Gary-Hammond area, is that correct?

A Yes, if the request was sent there, they would, and the request should be sent there.

Q If Borden were making a payment of an interest subsidy to a customer, would you have had a record of it in the accounts payable department?

A Yes, if they issued a check, it's got to be in there. We can't balance our cash unless we do.

Q If Borden were to have been making a payment for a grand opening assistance, would that have been in the accounts payable department?

A It should be.

Q But once again it would not be on this request for special sales expense check?

A Well, I don't know what a branch manager will do. You have got the wrong man. It should not be on there, now whether it is on there or not I don't know.

Q I understand. It should not be?

A It should not be.

Q Whether it is, you don't know?

A I don't know.

Q Now, Mr. Rouse, if one wanted to determine, as you were requested by the subpoena, the actual net price charged to a customer on the O'Hare route for the months of February and March 1956, could we do so by reference to the Borden route books for that customer and the check copies or check registers?

MR. SCHAEFER: Your Honor, I didn't want to interrupt the question, but I'd like to object to the form of it insofar as I believe Mr. Foley said if one were to determine, as you were requested by the subpoena, the net price on the O'Hare route customers, and I don't believe that with respect to the O'Hare route customers that was the request of the subpoena, and therefore I think that it is an inappropriate form of question.

MR. FOLEY: Well, I will withdraw that.

By Mr. Foley:

Q If one wished to determine the actual net price charged to a customer on the Borden O'Hare route for the months of February and March 1966, could he do so by reference to the Borden route book for that customer and the rebate register check register?

A No, you'd have to get the invoice in the case of office billed accounts.

Q Now, can the amount reflected on the check register or rebate memoranda be applied across the board against all of the items purchased by the customer?

For example, a customer bought $1,000 of merchandise at list price and the $1,000 entitled him to a 10 per cent discount, so that he received a check for $100. Can we say whether each item purchased by the customer therefore received a 10 per cent discount?

A I never was concerned how that was applied.

Q Is your answer you don't know?

A It --

Q Mr. Rouse, is your answer you don't know?

A I don't know.

Q Thank you.

A Thank you.

Q Mr. Rouse, I call your attention again to Commission Exhibits 120 through 151 inclusive. I believe you were

A Well, let's take them one at a time.

121 is the Calumet area. 122 is the Calumet area; 123 --

Q 121 and 122 are published price lists, are they not, sir?

A Yes.

Q And 123, is that a discount schedule?

A Yes. This is the Calumet area. I just noticed the Hammond Branch which is in our case more or less synonymous -- No, it wasn't. The Calumet area routes were part of the Hammond Branch.

Q But if the discount schedule were applicable in the Hammond area, then they would also cover the Calumet area stores, is that correct?

If the discount was for the Hammond area, Calumet is a subdivision or part of Hammond, is that not right?

A I would say that is correct. Now, I can't be held --

Q Yes. To the best of your knowledge.

A We don't know what the Calumet area is really. It is a term used by the newspapers to indicate a part of Chicago. Now, whether the Calumet area there is the same as what we considered --

Q Well, for example, do you know whether the Calumet area as used by Borden on those documents includes the City of Valparaiso in Indiana or not?

In this marketing area there is a Local 754 that has to do with the inside dairy workers, and there is a 753 that has to do with the drivers.

There is multiple negotiations, and this industry historically has been whiplashed between these two unions until the highest labor rates are in this marketing area as against all other dairy rates that we know of in the United States.

In addition thereto, the drivers union sought for many, many years to protect an antiquated device known as the home delivery system, and by doing that they have tried to do it with economic injunctions in the essense of the contract.

They -- they used to dictate, through violence and force, but a lawsuit filed by us, and sustained in the Supreme Court of the United States issued an injunction against that practice, so they imposed a very high individual commission to each driver, and in this market today, men are serving five and six stores and making $25,000 a year because they got 90 cents a hundred quarts commission.

the New York headquarters. At this time, how many were there, if you recall?

A That figure of 32 is a guesstimate. I believe I am reasonably close. I would have to answer your question by saying the number was approximately the same. I have no recollection of the exact numbers.

Q But the Middle Western Division did take in more territory than the Chicago Division?

A Yes, sir.

Q At the time there was a Middle Western Division, was the Chicago portion always a portion of this Middle Western Division?

A Yes, sir.

Q Within the Middle Western Division, what was the chain of command through to the New York headquarters?

A The Chicago unit was responsible to the Middle Western Division and of course the Middle Western Division in turn was responsible to New York. Each department within the Chicago unit had a counter department within a divisional office and so into headquarters as well.

Q You stated prior to 1969 you were the head buyer for the Chicago unit?

A Yes, sir.

Q When did you start in this position, sir?

A In August of 1964.

Q Would that be about the beginning of August?

A It is my recollection it was the early part of August, yes, sir.

Q During this period of time you have stated that there were counterparts of the division of the unit departments at the division level. Who was your counterpart at the division level during this period of time?

A It was Mr. Ira R. Bartels.

Q What was his title, sir?

A Divisional director of purchases.

Q As head buyer for the Chicago unit, what were your responsibilities?

A Basically as the head buyer for the Chicago unit, I was responsible for the procurement of merchandise for resale in our stores. This has many facets and products.

Q You were responsible for the purchase of all of these products?

A I had a measure of responsibility for the purchase of all of these products.

Q By measure, I take it you had other buyers working under you?

A Yes, sir.

Q In the case of dairy products, was there a dairy buyer or did you handle this personally?

A As far as procurement of dairy products is concerned, except for cheeses, with the exclusion of cottage cheese, I was

Mr. Mathias, was to make certain each department was aware of the program within the other departments. The chairman of the Executive Committee, of course, did report to us on the commit any information that he received from the divisional offices.

Q Who was the chairman of the Executive Committee?

A We had several men who were general managers and unit heads of the Chicago unit in the 1964-1965-1966 era. As I recall, when I became head buyer, the Chicago unit was headed by Mr. Mark Pierce and he was succeeded by Mr. William Lewis. Of course, currently it is Mr. Poyner. There are others in between there.

Q The head of the Executive Committee was always the head of the Chicago unit?

A Yes, sir.

Q I take it from your statement there is presently an Executi Committee for the Chicago Division and it is headed by the head of the Chicago Division?

A Yes, sir.

Q In connection with your duties as head buyer, who did you report to?

A I reported both to Mr. Pierce and of course to Mr. I.R. Bartels.

Q Mr. Pierce was the Chicago unit head at that time?

A Yes.

Q Later I take it when he was replaced you reported to whoever was replaced and to Mr. Bartels?

A Yes, sir.

Q When you assumed your position of head buyer for the Chicago unit in August of 1964, who did you replace, sir?

A I replaced Mr. I.R. Bartels.

Q He had held the same position of head buyer just prior to you?

A Yes, sir.

Q Was he also a member of the Executive Committee?

A While he was head buyer, yes, sir.

Q In this period 1964-1965-1966, approximately what area was covered by the Chicago unit of the Middle Western Division?

A The geographical boundaries were at that time identical to what they are today.

Q In other words, the Chicago unit had the same geographic boundaries in 1964 through 1966 as the Chicago Division has at the present time?

A Yes, sir.

Q Has that remained true generally throughout the period 1964 up to the present?

A Yes, sir.

Q You mentioned that at the present time the Chicago Division had approximately 170-some stores, I believe.

A Yes, sir.

Q In the period 1964 and 1965, were there a greater number of stores in the Chicago unit at that time?

A Yes, sir.

Q Do you recall the approximate number of stores?

A I would estimate that to be 260.

Q Within that area, was there any further sub-unit breakdown? Did A&P have districts or areas within the Chicago unit?

A Yes, sir. We have what we refer to as territories within the current division and units back in 1964-1965.

Q Would they be approximately the same now as they were in 1964, 1965?

A I believe there were some changes made in the territories.

Q Do you recall in 1964-1965 and 1966, for instance, the approximate breakdowns of the territories in the Chicago unit?

A It is my recollection there were approximately 14 territories during that time.

Q Do you have any recollection as to the areas covered by each of those or as to some of those?

A In broad general terms. I cannot be specific on each of the 14 territories, no, sir.

Q To the best of your recollection, could you describe these territories?

A The farwestern territory would have encompassed all the Iowa stores and those stores on the Illinois side ~~and~~ Of the Quad City area. We had a supervisor with headquarters in the Rockford area who had the Rockford stores. and the stores

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immediately surrounding Rockford, a supervisor headquartered in Waukegan, Illinois, with approximately 14 or 15 stores, again located in the northeastern section of Illinois.

We had and still have a supervisor headquartered in South Bend who had and still has approximately 14 or 15 stores; one headquartered in Gary, Indiana, again with the same number of stores and his stores being in that general area; a supervisor headquartered in Jolliet with stores in that general area. I believe I have enumerated six and the others would be in the greater Chicago area.

Q As head buyer, were you responsible for buying for all of these various territories?

A Yes, sir.

Q You had mentioned warehouses earlier. How many warehouses did A&P maintain in the Chicago unit in this period 1964 to 1965?

A When I became head buyer in the Chicago Division, we had a north side grocery warehouse, a south side grocery warehouse, a sub warehouse for groceries in Riverdale, Iowa. We had a meat warehouse, a perishable warehouse, a frozen food warehouse and, of course, our bakery and actually while not a warehouse, I did have responsibility in the area of transportation, the purchase of supplies, equipment which, of course, would have been for our garage.

Q Were most of these later units in Chicago, that is, the meat, the bakery and the garage?

Q Do you recall what you said to Mr. Tarr on this occasion?

A No sir, I do not recall specifically.

Q Mr. Tarr was a frequent visitor in your office, was he not, sir?

A Yes, sir.

Q Would he be in your office a matter of a couple of times a week at least?

A I would believe most generally once a week.

Q Why was Mr. Tarr such a frequent visitor to the A&P offices?

JUDGE HINKES: If you know.

THE WITNESS: For one reason, he brought in weekly purchase reports. These reports were prepared by his office indicating the point and dollar value of our milk purchases in the preceding week.

By Mr. Mathias:

Q Do you know what Mr. Tarr's position was with the Bordon Company?

A Not specifically, Mr. Mathias.

Q When you mentioned that he brought in the point in dollar value report, would this be dollar wholesale or dollar retail?

A It would be wholesale -- our paying price on the product.

As I recall, Mr. Mathias, there might have been and I would have to see documents to refresh my recollection but there may have been a figure on retail value also.

Q Did Mr. Tarr, to your recollection, conduct any other business with your office in his visits?

MR. MCINERNEY: With other people in his office, do you mean?

MR. MATHIAS. No, with Mr. Schmidt. He stated he personally handled the dairy business.

THE WITNESS: Would you restate your question?

By Mr. Mathias:

Q Was the only purpose of Mr. Tarr's visit to bring a weekly sales list?

A That was not his only purpose but that purpose prompted for the most part his weekly appointment with me.

Q What other types of business would he transact with you?

A In general, as I recall, Mr. Mathias, there would be promotional offerings that he would bring in. He would discuss although I can't recall specifically, but some of the subject matter to include change in packaging.

Q Did he discuss any service problems you might have with him?

A Yes, I was just going to get to that -- service problems, anything that had a bearing on our buyer-seller relationship would be discussed on these occasions.

Q Do you recall how soon after your approach or your contact with Mr. Tarr concerning private label that Borden submitted a private label quotation to you?

A I can't be specific in my recollection but I believe it

Q What part did Herschell Smith -- first of all, who was Herschell Smith?

A Mr. Herschell Smith was one of our headquarters buyers.

Q This was in New York City?

A Yes, sir.

Q What part did he play in the Chicago unit's decision to explore the private label milk possibilities?

A Mr. Herschell Smith, of course, as a headquarters buyer was interested in what the various units within the two companies were handling and I would believe that this message indicates, too, as we did believe, that private label milk for the Chicago unit should be considered.

MR. MCINERNEY: I did not want to interrupt that answer but it is possible the witness is not testifying from personal knowledge on the basis of the way the answer came out. I also want to object to the question on that basis.

The questi[illegible]as a little vague. I wonder if we could have it clear whether that was on the basis of personal contact with Mr. Schmidt.

MR. MATHIAS. I think the objection is more in line of cross examination but I will ask one or two additional questions along this line of Mr. Schmidt.

By Mr. Mathias:

Q Do you recall, Mr. Schmidt, February 8 or thereabouts having a discussion with Ira Bartels concerning this telephone call from Mr. Smith?

A I have that general recollection, yes sir.

Q What was said to your recollection, not referring now to CX 11, but what did Mr. Bartels have to say concerning the intention and desires of the New York headquarters concerning private label milk?

A I have no recollection of Mr. Bartels making reference to headquarters on private label milk prior to the discussion that Mr. Bartels and I had on this message contained in this document.

Q At the time that you discussed this message, that being the one appearing in Commission Exhibit 11, what discussion did you have with Mr. Bartels at that time?

A It is my recollection Mr. Bartels called me into his office and indicated that Mr. Smith had called and indicated that we should ~~see your~~ seek quotations on private label milk and that I should basically pursue that subject.

I recall and this document refreshes my memory that we did discuss the possible sources of supply for that private label.

Q What was your discussion concerning the possible sources of supply at that time?

A It is my recollection that we, of course, recognized Borden would be a possible supply for private labels, that Mulzer might be. Those are the only two that come to mind.

MR. MATHIAS: I move CX 11 into evidence.

MR. MCINERNEY: No objection.

MR. WHITE: Has the handwriting been identified?

By Mr. Mathias:

Q Again referring to CX 11 and I believe I have the original in front of me or at least our original copy which may be a little clearer, can you identify the handwriting appearing on that page, sir?

A I would believe that that is Mr. Bartels' handwriting.

Q Do you recognize it to be such?

A I believe it is his, yes.

MR. MATHIAS: I will move CX 11 into evidence.

JUDGE HINKES: CX 11 is received.

(The document referred to was received in evidence as Commission Exhibit No. 11.)

By Mr. Mathias:

Q Mr. Schmidt, I call your attention to Commission Exhibit 14-D, which is a portion of the February 9 offer of the Borden Company, and the middle of the page where ~~incert~~ certain items of delivery expense are referred to.

Mr. Schmidt, I note that among the items of route delivery expense itemized on CX 14-D is, number ~~16-day~~ (1) six day delivery per week with one delivery per store. Do you recall why delivery in this area was to be on a 6-day per week basis?

A Mr. Mathias, the reason I am hesitating is because when the February quotation, did you receive that quotation in the same manner, sir?

A It is my recollection that I would have, yes sir.

Q Mr. Schmidt, did Commission Exhibit 14 and Commission Exhibit 18 with various subparts collectively constitute a quotation on private label milk and dairy products for the entire Chicago unit?

A I would believe that they are covered, yes sir.

Q Mr. Schmidt, I hand you Commission Exhibit 21-A through U and ask you if you are familiar with this document, sir?

A Yes, sir.

Q Have you seen this document before, Mr.Schmidt?

A To the best of my recollection it seems to be the type that I did see before, yes sir.

Q Do you know under what circumstances you had seen this document previously?

A No, I do not recall the specific circumstances.

Q What is it, sir? Do you recall that?

A I believe that the distinction between the two ---

Q Between 18 and 21?

A Between 18 and 21, Exhibit 21 seems to be more complete in giving the quotation for certain areas, depending on the number of deliveries per week.

Q CX 21 was basically a revision of CX 18. Is that the case, sir?

A I believe I would agree with that, yes sir.

Q Do you know whether or not Mr. Tarr would have delivered this document to you?

A Most likely, he did.

Q At any time during the negotiations, you have mentioned that you dealt primarily with Mr. Tarr. Did you have dealings with anyone else at the Borden company?

A I have no recollection of anyone other than Mr. Tarr being at my desk but I know on occasions Mr. Minkler was at my desk in 1965 and I recall specifically one time when Mr. Joe Malone was at my desk but I have no specific recollection because of the time element involved here as who came on what date with whom and for what purpose.

Q Do you recall the occasion on which Mr. Malone visited with you?

A The one occasion I recall where Mr. Malone was with Mr. Tarr was where he made a presentation, if you care to call it that, of a cost comparison distribution system, Chicago - New York.

Q You don't recall any other conversations you had with Mr. Malone?

A I do not recall any specifically other than that one.

Q Mr. Schmidt, I hand you copies of Commission Exhibits 23-A through I, 24-A and B and C and D -- 24-A through E, Commission Exhibit 25-A, Commission Exhibit 26, 27 and 28 and ask you if this is the comparitive cost study to which you have just referred, sir?

A It appears to be that document, yes sir.

JUDGE HINKES: What was your reference to Exhibit 24?

MR. MATHIAS: 24-a through E, Your Honor.

By Mr. Mathias:

Q I now hand you, Mr. Schmidt, Commission Exhibit 30 for identification and ask you if you can identify this document, sir?

A Yes sir, this is a letter that I addressed to Mr. I. F. Bartels.

Q Mr. Schmidt, do you recall the circumstances under which this letter or memorandum was prepared?

A I, of course, was responsible to Mr. I. R. Bartels for quotations on milk. After I received this quotation, I sent it along with this letter to his office.

Q Would that quotation have been CX 21-A and 14-A which you previously reviewed?

A I cannot be absolutely certain of the document that accompanied this letter. It would be speculation on my part, Mr. Mathias.

Q But at this time you did forward to Mr. Dartels certain quotations by the Borden Company?

A Yes.

MR. MATHIAS: I move Commission Exhibit 30 into

AFTERNOON SESSION

1:30 P.M.

JUDGE HINKES: On the record.

You may continue, Mr. Mathias.

ELMER R. SCHMIDT resumed the stand and testified further as follows:

DIRECT EXAMINATION (Resumed)

By Mr. Mathias:

Q I hand you Commission Exhibits 40, 41, 38 and 39. Would you review those, please.

Referring to Commission Exhibits 40 and 41 for identification which appear to be copies of the same memorandum, one signed and one unsigned, can you identify these documents, sir?

A I believe the unsigned one was part of the files maintained in my department. The one that was signed was the one that was forwarded to Mr. Bartels with the quotations.

Q When you mention quotations, those are the quotations referred to in the memorandum. Would those be Commission Exhibits 38 and 39?

A I would have to see those again.

Q Those are in front of you, sir.

A It is my recollection they might have been these.

Q Do they appear to be the attachments to this memorandum?

A It would be my recollection that they would have been attached.

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Q Referring to CX-41, there is handwriting on CX-41 in two places. Ignore the handwriting in the lower left hand corner. It is just a reference to a Commission file, but in the middle of the sheet, middle of the page, there is a handwritten notation one word underlined. Can you identify the handwriting thereon?

A Yes, Mr. Mathias, that is my handwriting.

Q What is the word?

A The words is "insufficient."

MR. MATHIAS: I offer CX-41, 42, 38 and 39 in evidence.

MR. McINERNEY: No objection.

MR. WHITE: Your Honor, I would like to ask a few questions.

JUDGE HINKES: Very well.

VOIR DIRE

XXX

By Mr. White:

Q Mr. Schmidt, when did you place the word "insufficient" on CX-41?

A It occurred after the 16th and after a conversation with Mr. Bartels. I do not recall the specific date.

Q But after you had forwarded CX-40 to him?

A Yes, sir.

MR. WHITE: That is all right now, your Honor.

JUDGE HINKES: 38, 39, 40 and 41 are received.

(The documents referred to, heretofore marked for identification as CX-38, 39, 40 and 41 were received in evidence.)

JUDGE HINKES: Off the record.

(Discussion off the record.)

JUDGE HINKES: On the record.

By Mr. Mathias:

Q Mr. Schmidt, I hand you Commission Exhibit 45 for identification and Commission Exhibit 46D through F for identification and Commission Exhibit 47 for identification and Commission Exhibit 48A through I for identification and ask you to familiarize yourself with those documents, sir.

A I have read them, Mr. Mathias.

MR. McINERNEY: Excuse me a minute, I have not.

By Mr. Mathias:

Q Mr. Schmidt, referring to Commission Exhibit 45 for identification, whose handwriting appears on this paper, sir?

A This is mine.

Q What was the occasion for preparing this note which appears to cover a span of time from August 18 to October 12, 1965?

A This is a personal memo that I prepared for myself recording the conversations I had with Henry ~~[illegible]~~ Soldwedel or his office concerning any interest he might have in quoting on private label milk.

Q Mr. ~~[illegible]~~ Soldwedel was with what company?

A Wanzer Dairy.

Q Did Mr. ~~Soldweder~~ Soldwedel or Wanzer ultimately submit a quotation?

A No, they did not.

Q Mr. Schmidt, referring now to Commission Exhibit 46D through F for identification, can you identify these papers?

A Yes, I can, Mr. Mathias.

Q What are they?

A Basically they are my small attempt to prepare forms that might be used by me in the solicitation of quotations for private label. At that particular time we did not have any forms, none were at the desk when I took it over. To the best of my knowledge none was available from higher echelon.

Recognizing that the Borden Company's format and preparation and submission of the quotation to me had some merit, I merely had my secretary copy the paragraph designation, so to speak, from the Borden documents and put in this form.

The product list, of course, I devised myself from our standard list of items. After I prepared them, I placed them in my file and never did use them and they remained there, of course, until you gentlemen saw copies.

Q In your contacts with other dairies, did you request data along this general format from the various dairies?

A It is not my recollection that I used this identical format, no, sir.

Q Referring then, Mr. Schmidt, to Commission Exhibit 47, can you identify this document, sir?

A Yes, sir, this is a letter that I sent to our financial department in our headquarters in New York City, as you will note, requesting a Dun and Bradstreet report on Sidney Wanzer Dairy.

Q Commission Exhibits 48 A through I is the Dun and Bradstreet report you received as a result of that request?

A Yes, sir.

Q Mr. Schmidt, in addition to Wanzer, what other dairies were contacted concerning the supply of private label milk to the Chicago unit of A&P?

A I contacted Bowman Dairy, Dean and Hawthorn Melody.

Q Approximately what period of time was this contact made?

A Approximately early August of 1965.

Q I call your attention to Commission Exhibit 45 again, your handwritten memorandum concerning Wanzer Dairy and ask if this would refresh your memory in this regard?

A It is August of 1965 -- perhaps not as early as I indicated it was.

Q Did you contact all at approximately the same time?

A Yes.

Q After reviewing CX 45 would it be your opinion this was approximately August 18, 1965?

A It is in the general area of the 18th, yes, sir.

MR. HAWKINS: I offer CX-45 in evidence.

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MR. McINERNEY: No objection.

JUDGE HINKES: CX-45 is received.

(The document referred to, heretofore marked for identification as CX-45 was received in evidence.)

CX

By Mr. Mathias:

Q Mr. Schmidt, did you receive offers from any of these other companies that were contacted in mid-August of 1965?

A Yes, I did receive the quotation from the Bowman Dairy Company and we did receive a quotation from Dean. However, it was for the Indiana territory only.

Q I hand you Commission Exhibit 50A through V and ask you if this is the offer which you received from the Bowman Dairy Company?

A Yes, sir, it is.

Q I hand you Commission Exhibit 51A through C for identification and ask you if this is the offer you mentioned from the Dean Company for northern Indiana?

A Yes, sir.

Q Mr. Schmidt, were you interested in an offer for the northern Indiana stores only?

A No, we were not, Mr. Mathias.

MR. MATHIAS: I offer Commission Exhibit 50A through V and 51A through C in evidence.

JUDGE HINKES: Received.

that is, Commission Exhibit 62 with sub parts, the final offer of the Borden Company?

A Yes, sir, it was.

Q This was tendered to you on or about September 21?

A Yes, sir.

Q Was this delivered to you by Mr. Hinkler and Mr. Tarr on or about that date?

A Yes, sir.

Q You answer was yes?

A Yes.

Q I hand you Commission Exhibit 65A through C for identification and I ask you if you can identify this document?

A Yes, sir, I can identify them.

Q Referring to Commission Exhibit 65A for identification, Mr. Schmidt, whose handwriting appears thereon?

A That is my handwriting.

Q Does that include all of the figures that have been pencilled in as well?

A Yes, sir.

Q Commission Exhibit 65B and C seem to be approximately two copies of the same thing. Were these prepared by your office, sir?

A Yes, sir.

MR. MATHIAS: I offer Commission Exhibit 65A through C into evidence.

9 MR. McINERNEY: I don't have a copy of C, but if it is a duplicate, I see no reason for two of them.

MR. MATHIAS: Let me make a brief check to see if they are identical. If they are, we will just offer A and B.

They do seem to be identical, so I will amend complaint counsel's officer to include only Commission Exhibit 65A and B.

JUDGE HINKES: 65A and B are received.

XXX (The document referred to, heretofore marked for identification as CX 65A and B were received in evidence.)

By Mr. Mathias:

Q I hand you Commission Exhibit 66A and B for identification, Mr. Schmidt, and I ask you to familiarize yourself with this document. I am sorry it is in cut up form, but this is the way we received it from A&P.

A Yes, sir, this is a document that I wrote to Mr. Bartels at my home in Libertyville and sent on into his office.

Q This was prepared on September 28, 1965, was it, sir?

A Yes, sir.

MR. MATHIAS: I offer CX 66A and B in evidence.

MR. McINERNEY: No objection.

JUDGE HINKES: Exhibit 66 is received.

CX (The document referred to, heretofore marked for identification as CX 66A and B were received in evidence.)

By Mr. Mathias:

Q Mr. Schmidt, I hand you Commission Exhibit 67 for identification and ask you if you can identify this document, sir?

A Yes, sir.

Q Have you seen this document before, sir?

A I did not see it in 1965, no, sir.

Q When did you see it, sir?

A I believe it was in Mr. McInerney's office that I saw it first.

Q Approximately what time period would that be, sir?

A That I saw it in Mr. McInerney's office?

Q Yes.

A Mr. McInerney can correct me if I am wrong, but I would believe several weeks ago.

Q Mr. Schmidt, do you recall outside of any reference to CX 67 whether or not it was your recommendation to Mr. Bartels at this time that the Borden offer of September 21, 1965 be accepted?

A Would you restate that question, please.

MR. MATHIAS: Would the reporter read it back, please.

(The question was read by the reporter as follows: Mr. Schmidt, do you recall outside of any reference to CX 67 whether or not it was your recommendation to Mr. Bartels at this time that the Borden offer of September 21, 1965 be accepted?)

THE WITNESS: My memory does not serve me very well on this instance. I cannot recall.

By Mr. Mathias:

Q That is sufficient.

MR. McINERNEY: I am not sure he finished his answer.

THE WITNESS: I believe it is most likely that I would have indicated that the Chicago unit would like to continue with the Borden label.

By Mr. Mathias:

Q With the Borden Company?

A Yes, with the Borden Company primarily because of the label involved.

Q Do you know whether or not the decision to purchase private label milk and dairy products from Borden or some other dairy had to be approved by the New York headquarters?

A I know that the approval certainly would come from Mr. Bartels. I did not know whether he would have to secure approval from headquarters in New York.

Q At one time previous to the time you were head buyer for the Chicago unit, you had been the assistant to the director of purchases for the midwestern division; was that not correct, sir?

A Yes, sir.

Q Did you at this time become familiar with the policies of A&P in this regard with regard to approval from the New York

15 By Mr. Mathias:

Q Mr. Schmidt, your handwrittin notation at the botton of Commission Exhibit 70A indicates that service of private label from the Borden Company will begin on November 1st. Is that in fact when service did commence under your private label arrangement with Borden?

A That is my recollection.

Q That would be November 1, 1965?

A Yes, sir.

Q Mr. Schmidt, I hand you Commission Exhibit 75A through J which is already in evidence and I note on a number of papers there are handwritten notations in the margin. I wonder if you could tell me whether or not you can identify the handwriting?

A That is my handwriting.

Q I think there is some on subsequent pages, too.

I note on Commission Exhibit 75A and B there are handwritten notations. Is all of that in your handwriting, too, sir?

A Yes, it is, Mr. Mathias.

Q I note also on Commission Exhibit 75I and J that certain stores or certain towns' names have been lined through. Do you recall whether or not you were the one who lined out these particular names?

A I don't recall whether I did or not.

Q Do you know whether or not the A&P stores in Streator, Clinton and Davenport were served under the A&P Borden private

A Providing a certain reasonable notice were given.

Q Was there any written provision or agreement between Borden and A&P that such reasonable notice be given?

A There was nothing in writing that I recall.

Q Was there any oral arrangement that you can recall which ovided that notice of any stated duration would be given ior to termination?

I do not recall any verbal conversation in that direction, , sir.

MR. MATHIAS: Your Honor, the witness has been on the tand for another hour. I am at a point where I would like to ine up a few other exhibits. If we could take a recess now or about five minutes, it would be helpful.

JUDGE HINKES: We will be in recess for a brief period.

(A brief recess was taken.)

JUDGE HINKES: On the record.

Mr. Mathias:

Mr. Schmidt, I hand you Commission 102A through C and ask if you can identify this document, sir?

Yes, sir.

Are you familiar with this document, Mr. Schmidt?

Yes, sir; I am.

This document is addressed to you. Did you receive it, sir?

19 A Yes, sir.

Q I note on CX 102B at the bottom of the page below the signature there is a handwritten notation. Can you recognize the handwriting thereon?

A Yes, that is mine, Mr. Mathias.

Q Also on Commission Exhibit 102C there are certain handwritten notations. Do you recognize that handwriting, sir?

A Yes, sir, that is my handwriting.

Q Returning to Commission Exhibit 102A, do you know who put the X in the margin at the bottom left hand side of that page?

A Most likely I did.

Q This carries over to the top of Commission Exhibit 102B where there is another X next to the end of that same paragraph. Is it your opinion that you made this X as well, sir?

A Yes, sir.

MR. MATHIAS: I offer CX 102A through C in evidence.

MR. McINERNEY: No objection, your Honor.

JUDGE HINKES: 102A through C is received.

(The document referred to, heretofore marked for identification as CX 102A through C was received in evidence.)

By Mr. Mathias:

Q I hand you 103D through F for identification, Mr. Schmidt, and I ask you if you can identify this document, sir?

A Yes, sir.

BEST COPY AVAILABLE

Q Referring to Exhibit 103D for identification in the middle of the page there is certain handwritten notations. Can you identify the handwriting therein, sir?

A My copy is not as distinct as it should be for ready identification. I do not believe that that is my handwriting.

MR. MATHIAS: Does Mr. McInerney have the original of this document? We were only supplied with a carbon.

MR. McINERNEY: No, we don't.

By Mr. Mathias:

Q Returning to 103E there are certain handwritten notations at the upper right hand corner of this page and in the lower left hand corner of the page. Can you identify any of this handwriting, sir?

A It would appear to be the initials of RW. There, again, I cannot identify the handwriting in the upper right hand side, but the handwriting in the lower left hand corner is mine, Mr. Mathias.

Q Turning now to Commission Exhibit 103F, can you identify the handwriting appearing on this page, sir?

A All of it is mine with the exception of that portion that is circled in the middle of that page, and that I recognize as Mr. Bob Witzke's hand.

Q Who is Mr. Witzke?

A He was my assistant at that time.

MR. MATHIAS: I offer 103D through F in evidence with the exception of the handwritten notation on 103D in the middle of the page.

MR. McINERNEY: We do not have any objection at this time. May I ask one question with respect to these documents?

JUDGE HINKES: Yes.

VOIR DIRE

By Mr. McInerney:

Q You have been asked to refer to various handwritten notations Mr. Schmidt, which you have identified as your own. For example, if you still have before you Exhibit 102B and C --

A No, I do not have those in front of me, Mr. McInerney.

Q I just wanted to use that as an illustration, but perhaps 103E and F would serve just as well.

In identifying that handwriting, do you know what the various notations refer to? Do they call to mind any present recollection of what this was all about or what you were writing about?

MR. MATHIAS: Is this in the nature of an objection? I am not sure what Mr. McInerney is doing.

MR. McINERNEY: I can save it.

MR. WHITE: What part was the part that was not included in the offer?

MR. MATHIAS: 103D, the handwriting.

THE WITNESS: Mr. Mathias, if I may make reference to 103F there is another section which is not in my handwriting.

A No, sir.

Q There was no request for any special product according to A&P's specifications?

A No, the only comment I recall in that regard was we certainly wanted the product to meet the minimum legal requirements of the city of Chicago and any other community that we had stores in that they would be servicing.

Q Borden was already servicing the greater portion if not all of this territory, was it not?

A Yes, sir.

Q Presumably its products meet the legal minimum specifications in all those areas already; is that not true?

A To the best of my knowledge that is true.

Q Is it your belief you would be receiving the same products under the A&P label that Borden put under its own label?

A I don't recall that I knew what Borden's specifications were for products under their own label. It is my recollection that I indicated to them that the minimum legal standard should be met for the A&P label.

Q In your dealings with any of the other dairies contacted, did you request any other specifications of them?

A No, sir, I did not.

Q It was on this same basis -- as long as it met the legal minimum specifications in each of these communities, that was all right?

A Yes, sir.

Q In November of 1965 and the period immediately thereafter, when A&P introduced private label milk and dairy products into the store, did it reduce the price of the private label products?

A To my recollection, we did not.

Q Following the beginning of purchases of private label milk and dairy products from the Borden Company in November, 1965, and subsequently thereto over in the next year or two, did you inquire to see if Borden's prices were being made available to other of its customers in these market areas on the Borden label or private label?

MR. McINERNEY: Could I have that question read back, please. It is a little complicated.

MR. MATHIAS: I will strike it and rephrase it. It got a little involved.

By Mr. Mathias:

Q Following November, 1965, did your office inquire to see if the price which Borden had granted to you on private label had been made available to its other customers in these market areas?

A I do not recall that I made any direct inquire, no, sir.

Q Did you request Borden at any time that they supply you with their published prices and published discounts for the areas covered by your Chicago unit?

A No, sir, I did not, and I believe at that point in my experience as a buyer of dairy products I would have recognized that there was no such thing as a published price.

Q Did Borden in this period, November, 1965 and 1966 sell private label to any other chains in the Chicago market area?

A Again, may I ask, Mr. Mathias, if you will repeat the time element here.

Q In late 1965 and 1966.

A It seems to me that in 1966, 1967 -- perhaps more like 1967 -- Mr. ~~Goss~~ Gose who was calling on us at that time indicated that he had acquired or the Borden Company had acquired a new private label account, but the time element is vague in my memory.

Q Do you recall who that account was, sir?

A It is my recollection that it was the Eagle Stores.

Q They were primarily down in the southern area of Illinois, were they not, sir?

A No, sir, they had stores in the northern section of Illinois -- Rockford, Waukegan area.

Q In connection with that private label arrangement, is it possible that this occurred in the middle or later part of 1968?

MR. WHITE: I object to whether it is possible.

JUDGE HINKES: Rephrase your question.

By Mr. Mathias:

Q Do you presently recall exactly or approximately the date on which Mr. ~~Goss~~ Gose notified you of this private label arrangement?

A I do not have an accurate recollection of the time of the year.

Q Mr. Schmidt, subsequent to November, 1965 and through the period 1965 and 1966, did you have occasion to keep track of the milk volume of sales out of the A&P stores in the Chicago unit?

A The Borden Company supplied us with the total sales figures by brand by weeks.

Q Do you recall, sir, whether during the period 1964, 1965 and 1966 that A&P's volume of milk sales was declining through this period?

A Through the period of 1965-1966?

Q Starting in 1964 and on through 1965 and 1966?

A It is my recollection that I was aware that our milk sales were declining along with our general sales volume, yes, sir.

Q Sir, are milk and dairy products an important line in your A&P grocery stores?

A Yes, sir.

Q Why is that, sir?

MR. McINERNEY: Your Honor, I am going to object to continuing questions along this line in that I think as there has been previous testimony there is a dichotomy in A&P between the buying and selling function and there is a completely separate chain of command with respect to both. This witness is not on the merchandising side of the business. I don't think he is qualified with respect to the sales functions.

one company; otherwise, he is a householder.

MR. McINERNEY: I object also, your Honor.

MR. MATHIAS: I believe the witness' own documents and the facts in this case indicate it was necessary for him to determine who was capable of supplying the A&P volume and in this regard plus his own long experience in the market, I believe he is qualified.

JUDGE HINKES: Why don't you approach it in a different vein. He testified he made certain contacts or attempted to. I think he should be asked why he selected those.

By Mr. Mathias:

Q Mr. Schmidt, it has been noted on the record that you contacted Wanzer Dairy, Bowman Dairy, Dean Foods as well as Borden. Were there any others you mentioned?

A Hawthorn Mellody.

Q Were these all the companies you had contacted in the course of your private label negotiations?

A These were the only ones I contacted, yes, sir.

Q What was the basis for your selection of these particular dairies?

A It is my recollection that basically we selected those because of their capability of supplying our stores with milk. That was the basic criteria.

JUDGE HINKES: Did their size indicate to you their capability?

THE WITNESS: Yes, sir.

JUDGE HINKES: Was their size the largest in the area?

THE WITNESS: May I ask you to repeat that question.

JUDGE HINKES: Was their size the largest in the area? Or were there larger ones that you did not contact?

THE WITNESS: They were the largest in the area. There was one other area that we did not contact which I recognized as sizeable and that was the dairy called the Country Delight. Country Delight is owned by Certified Grocers and they are a wholesale cooperative. From what I recall knowing about Country Delight at that time, we could not have purchased dairy products from them because we were not an independent retailer that was buying groceries from Certified.

By Mr. Mathias:

Q Mr. Schmidt, you have stated at various times Mr. Tarr apprised you of sales volume in connection with your purchases from the Borden Company. I show you Commission Exhibit 165A for identification and ask you if you have ever seen this document or a similar document before, just referring to the first page?

A I have no specific recollection of having seen this document, although by its very nature it is likely that I did see it.

Q You did see similar documents that were prepared and submitted to you by Mr. Tarr during the course of your tenure as head buyer for A&P?

A These statistics here or volume figures are shown on an annual basis. Therefore, I don't have the specific recollection although it does say sales to the Great A&P Tea Company. Again I would most likely assume it was shown to me, but I don't recall it.

Q I show you Commission Exhibit 163 for identification and ask if you can recall having seen this document previously?

A No, here again my recollection of seeing this very document back in that time slot is very vague.

Q Do you recall, Mr. Schmidt, during this period of time 1967 through 1969 Mr. Tarr discussing with you or other Borden officials, discussing with you at various times the decline in volume of milk and dairy products purchases by the A&P Company?

A I have no recollection of any specific conversations with them on that subject. However, it was certainly common knowledge to me and I am sure to them one of the barometers of overall sales volume, of course, is dairy sales.

Q The dairy sales were declining during this period of time in the A&P stores of the Chicago unit?

A Yes, sir.

Q Mr. Schmidt, I now hand you Commission Exhibit 91A and B and 92A through C for identification and ask you if you can identify these documents, sir?

A Yes, sir.

Q Can you identify these documents, sir?

school days.

Q Did you complete your college education, sir?

A No, I did not.

Q And between the time that you commenced employment with A&P, and up to the time that you became the Chicago Unit buyer, in August 1964, what had been your experience in purchasing dairy products?

A I had no experience at all.

Q Now, during your direct testimony you described various negotiations for private label milk in Chicago. Throughout those negotiations and even thereafter, did you ever discuss this private label arrangement with Mr. Herschel Smith of New York Headquarters?

A No, I did not.

Q You were also asked in your direct testimony a number of questions about the Executive Committee of your Chicago Unit. Did that Executive Committee participate in the private label negotiations?

A No, they did not.

Q Did they participate in reaching the decision to accept the Borden private label offer?

A No, sir.

Q Did they participate in the decision as to the price at which private label milk would be sold out of the A&P stores?

A No, sir.

Q I believe you told us about certain discussions you had with Mr. Tarr of the Borden Company with respect to private label milk. Did you in those discussions describe to him any formula or basis on which you wanted to receive a private label quotation?

A Yes, I did. Basically, I indicated to him that the formula should be predicated on the current cost of raw milk and should be stated in the quotation to us, and it certainly should include the other factors that would go into the final figure on a unit item basis, such as the cost of procurement, packaging, processing, delivery, overhead and profit.

Q Now, did you ask for a breakdown of these various costs?

A No sir, I did not ask for a specific breakdown. I merely asked that they be considered and be made part of the figure.

Q And thereafter when you requested quotations from other dairies, did you request them on the same basis?

A Yes, sir.

Q Now, did you ever tell Mr. Tarr or anyone else from the Borden Company that you were not going to seek quotations from any other dairies, for this private label milk?

A No, I did not.

Q I think in your direct testimony you were shown an exhibit which I believe is CX-14, containing a February, 1965 quotation from Borden for private label in their Chicago Calumet area.

Without showing you the exhibit, do you know that there it took too long.

Q Were you involved in other duties in addition to this private label negotiation at that time?

A Oh, yes.

Q Approximately how many products would you be responsible for buying as buyer for the Chicago Unit?

A There were approximately 8,000 items, on which I had varying degrees of responsibility.

Q Now, did you ever suggest to Borden, or anyone from Borden, how much A&P hoped to save on private label milk?

A No sir, I did not.

Q Did you ever mention that you were hoping for annual saving to A&P of approximately half a million dollars?

A No, sir.

Q In your direct examination you were shown an exhibit which I believe is identified as Commission Exhibit 23, which had to do with differences in costs between New York and Chicago. Do you recall that, sir?

A Yes, sir.

Q Now, on receipt of that exhibit -- I have a copy here, if there is no objection I will show it to the witness. If there is, I will be happy to have the original out.

MR. MATHIAS: Which exhibit?

MR. MCINERNEY: Commission Exhibit 23.

MR. MATHIAS: Oh, no.

did request quotations from other dairies, and that you mentioned Dean, Hawthorne Melody, Wanzer and Bowman. Now, from which of those dairies did you receive quotations for the Chicago area?

A We received a partial quotation for the South Bend area only, from Dean, and we received a full quotation for all stores in the Chicago Unit from Bowman.

Q Do you know why Wanzer and Hawthorne Melody did not respond to your request for quotations?

A No, I do not, sir.

Q And do you know why Dean gave an incomplete response to your request for quotation?

A No, I do not, sir.

Q Now, you were shown yesterday, document marked Exhibit 50 which I will now give to you, and you described it as a quotation from Bowman. Will you tell us approximately when and how you received this quotation?

A I received this quotation from Mr. Frank Cannon, personally, in a visit in our office at my desk.

Q Would you tell us what he said to you and what you said to him, as best you can recall it?

A The recollection that I would have is for the most part prompted by some notations that I have placed on the document. I recall that I sat down at my desk, he presented this to me, and I read it in his presence and there were several questions that I did raise that he clarified for me.

As I recall we first, or I first raised the question concerning this approximately $1 million, and as the document indicates there is an asterisk with what I put down on the lower left hand corner as an explanation of that $1 million, that it represented gross dollars at retail value.

I asked him on what basis he arrived at that $1 million. He indicated that with his previous experience in supplying A&P on a part basis, he was acquainted with our volume, and that in his opinion the figure was approximately one million, projected the whole unit.

I do recall that he indicated that that figure was not a requirement to the quotation, and as I recall we did discuss one of the attached attachments which indicated that the quotations would be applicable to all of our stores if --- well, those quotations, yes, would be applicable to all of our stores and if not the quotations would go up as we reduced the number of stords.

Q When you refer to the attachment, are you refering to CX 50-R, Mr. Schmidt?

A Yes, I am, Mr. McInerney.

Q Would you please continue?

A I'm ---

MR. MCINERNEY: I am sorry, would you read back the last, before I interrupted Mr. Schmidt, what he had been saying.

THE REPORTER: I do recall that he indicated that the figure was not a requirement to the quotation, and as I recall we did discuss one of the attached attachments which indicated that the quotations would be applicable to all of our stores if -- well, if those quotations, yes, would be applicable to all of our stores, and if not the quotations would go up as we reduced the number of stores.

By Mr. McInerney:

Q And in saying that, Mr. Schmidt, you were referring to Exhibit 50-R. Does that indicate other prices in the event that you gave the Bowman Company A&P's milk and dairy product business on something less than 100 percent of A&P's stores?

A Does not to me, no sir.

Q Would you look at the fourth and fifth columns of that exhibit, and tell us if there is a quotation in the event that Bowman were to supply 70 percent and 50 percent of A&P's stores in the Chicago Unit?

A Yes, sir, there is.

Q I am sorry, I think I interrupted you in your description of what you and Mr. Cannon said to each other at the time of the submission of this quotation.

A And you would like to have me repeat the essence of it?

Q No, I would simply like to have you tell me what he said to you and what you said to him.

A On this matter of the quotation in the event he got all of the stores or part of the stores?

Q If you recall anything else about that or if not on any other subject.

A Oh. I recall nothing further on this reference of approximately $1 million or Exhibit 50-R.

JUDGE HINKES: Before you go on, Mr. Schmidt, on Exhibit 50-R the first column is entitled, "Standard list price to chain store."

What, if you know, does that represent?

THE WITNESS: Your Honor, I have no recollection of analyzing the heading on that particular column at the time that Mr. Cannon was at my desk.

JUDGE HINKES: Let me ask you this. The next three columns are net prices, according to the chart.

THE WITNESS: Yes, sir.

JUDGE HINKES: These are the prices quoted to you by Bowman, as your cost of the various items, is that correct?

THE WITNESS: Yes, sir.

JUDGE HINKES: Now, comparing these figures with the much higher figure in the first column of list prices, would that indicate your cost of Bowman's milk, rather than private label, or would it represent your selling price? If you know.

MR. MCINERNEY: Your Honor, I think I can clarify that, if you will.

JUDGE HINKES: Very well.

THE WITNESS: Sorry.

By Mr. McInerney:

Q Would you look at Exhibit 250-A, the first page of this exhibit, sir. I am sorry, Commission Exhibit 50-A.

A All right.

Q And at the bottom of that page, or toward the bottom, rather, there is a listing of four items, the second of which contains a pencilled notation, and can you tell us whose handwriting that is?

A That slash and the word "or" is in my handwriting.

Q And was that as a result of your conversation with Mr. Cannon?

A Yes, it was.

Q Will you tell us what that means?

A Well, it was my interpretation as I read that subparagraph 2 in his presence, that both the Bowman label and the A&P label, might be necessary to secure the attached quotations. However, when I raised that point he indicated no, it could be the Bowman label or the A&P label, or both.

Q And would the prices quoted to you, for example, on Commission Exhibit 50-I, if you would look at that page.

A Yes, sir.

Q Would they be the same whether it was Bowman label or private label?

A Yes sir, that was my understanding.

Q In other words, this was a quotation of a net price to you, whether you took it as Bowman label milk or A&P label milk?

A Yes, sir.

MR. MCINERNEY: I don't know if that clarifies it, Your Honor.

JUDGE HINKES: Yes.

By Mr. McInerney:

Q Now, you were telling us, Mr. Schmidt, about the talk you had with Mr. Cannon of Bowman Dairy. Incidentally, did we establish who Mr. Cannon is? Can you tell us?

I am not clear whether the record indicates who Mr. Cannon is, or was at that time.

A I did not know his exact title at that time. However, I knew he was responsible for sales of the Bowman Dairy Company. I see on the document that his title was General Manager, Wholesale.

Q And had he previously to this time in 1965 called on A&P and sold milk to A&P, the Bowman milk?

A Yes, he had, and up until the mid 50's, at which time the Bowman Dairy served approximately half of the Chicago Unit A&P stores with dairy products.

Q And who sold approximately the other half?

A The Borden Company.

Q And somewhere in or around that time the Bowman Company ceased to supply A&P, and the Borden Company took over most of the supply of A&P's dairy products, is that correct?

A Yes, sir.

Q Would you please continue with what you recall about what you said to Mr. Cannon and what he said to you on the occasion of his submission of this quotation?

A I do recall that we went over this document page by page, but I don't have anything noted until we get to Exhibit, I believe that is 50-I.

Q Is that your handwriting at the bottom of 50-I?

A Yes, sir, it is.

Q And what was the occasion for your writing that?

A I saw that word on top of column two, the word "mark up", and asked him what that included. And he indicated to me that it included overhead and profit.

Q How much profit?

A He volunteered, approximately six percent.

Q Do you recall anything else that was said on this occasion?

A I have no recollection, Mr. McInerney, of anything else that we discussed on that occasion, other than what I have commented on.

Q Now, Commission Exhibit 50-B lists certain costs not considered in the quotation. And it does not appear to include any saving for pre-ordering. What is your understanding as to whether or not this Bowman quotation included any reduction in

JUDGE HINKES: Well, suppose you try again and see if you can have it a little clearer to the witness without any leading.

By Mr. McInerney:

Q Can you tell us, Mr. Schmidt, when, or under what circumstances, there was first any discussion with anyone from Borden with respect to the point of revising the quotation about which you have previously testified, and to which you referred, I believe, when you were looking at Exhibit 41, which was that memorandum from you to Mr. Bartels, on which you had written "insufficient"?

A It is my recollection that certainly within several days after my conversation with Mr. Bartels that resulted in my writing the word insufficient on my file copy of that document, that I contacted the Borden Company, Gordon Tarr, specifically, and indicated to him that we were going to ask other dairies to give us a quotation on our private label milk.

And that since we were going to go to outside dairies for quotations on private label milk, and because the quotation we had received from them did have some age to it, we would give them the opportunity of re-evaluating it, or of indicating to us that after their evaluation, it would stand as submitted.

That is the best of my recollection, Mr. McInerney.

JUDGE HINKES: Mr. Schmidt, your previous testimony was to the effect that you did tell Mr. Tarr that you had other

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competitive bids. But you didn't tell him that you had the Bowman bid, is that correct?

MR. MCINERNEY: May we just get the time sequence, Your Honor?

JUDGE HINKES: Yes, this was after you had received the bid from the Bowman Company. And if I understand your testimony, and correct me if I am wrong, you then told Mr. Tarr that you had other competitive bids but didn't say that you had the Bowman bid, specifically?

THE WITNESS: That is correct, and as Mr. McInerney has hinted, there are two periods of time involved. My answer to his last question related to the conversation I had with Gordon Tarr after Mr. Bartels and I made the decision to get to other bids.

My conversation with Mr. Tarr in which I indicated to him that we had competitive bids occurred after we had received the Bowman bid, and there is a time span of approximately two to three months.

JUDGE HINKES: Now, at that second occasion, which was the one I was referring to in my question, you also told Mr. Tarr something about your waiting for their revised bid, is that correct?

THE WITNESS: Their revised bid, or an ~~occasion~~ indication that the first bid should be the one that we should consider as the only bid.

JUDGE HINKES: Well, isn't that the same thing that you told Mr. Tarr at the first occasion?

MR. MCINERNEY: I think that is the confusion, Your Honor. Well, the witness can explain it.

JUDGE HINKES: A moment ago I thought you told me that on the first occasion you told Mr. Tarr that they could revise their bid or stand by it?

THE WITNESS: That is right.

JUDGE HINKES: Now, on the second occasion you told them the same thing.

THE WITNESS: Yes sir, because we still had not received an answer from them.

JUDGE HINKES: Very well.

MR. MCINERNEY: The only difference if I may, Your Honor ---

MR. MATHIAS: Your Honor, I would object to Mr. McInerney characterizing the witness' testimony.

MR. MCINERNEY: All right.

MR. MATHIAS: The witness has testified, and Mr. McInerney's testimony is not needed on this point.

JUDGE HINKES: I think I understand the witness' answer, Mr. McInerney.

By Mr. McInerney:

Q Had there been any response from Borden, between the time that you told Mr. Tarr that A&P was going to solicit other quotations, and the conversation about which His Honor was just questioning you? In other words, had there been any word from them in the meantime as to whether they were going to let their previous quotation stand or revise it?

MR. MATHIAS: Your Honor, I again object to leading the witness.

MR. MCINERNEY: I submit that was not a leading question, Your Honor.

JUDGE HINKES: I think the witness has already answered that in response to my question, when he said that he hadn't heard anything.

MR. MCINERNEY: All right, I simply wanted to clarify the matter, and if it is clarified I will drop the subject.

By Mr. McInerney:

Q Now, as best you can recall, when and how did you first learn that Borden was going to revise the quotation it had given you sometime in the summer of 1965?

MR. MATHIAS: Your Honor, I would again object to leading the witness. I don't believe there is any necessity at this point. There has been no testimony by the witness at this stage that he had learned of this intention.

I believe that Mr. McInerney's question is leading, and unnecessarily so at this point.

MR. MCINERNEY: Your Honor, I submit that there is no dispute here about whether or not there was a revision, and I was merely trying to expedite matters. Again I don't think it was a leading question.

I have been very restrained in making that objection to Mr. Mathias's questions, I submit ---

JUDGE HINKES: Well, in any event, I will allow the witness to answer. I think that you certainly are aware, Mr. McInerney, that to the extent the question may be leading, you diminish the probative value of the answer and it is to your own advantage not to employ those questions whether or not objection is made.

MR. MCINERNEY: Yes, Your Honor, but I did not believe it is leading. If Your Honor thinks it is leading, I will try to rephrase it. I don't think there is any dispute about the fact there was such a revision, and I am merely trying to get when he learned about it.

JUDGE HINKES: The witness will answer.

THE WITNESS: I don't recall the specific date, but I do recall receiving a phone call from Mr. Tarr, indicating that I would receive a revised quotation. I asked him, as I recall, approximately when I would receive it. And he indicated that it would take some days to type it and put it in good order and present it to me.

And I do recall that he made the comment that the savings would be substantially increased. Now, again bear in mind that I cannot quote him directly. The general recollection I have is that he made reference to the fact that the savings would be greater than the quotation previously submitted would afford.

Of course, then the quotation was delivered. Again here my recollection is hazy, but I believe perhaps within the week.

By Mr. McInerney:

Q Was it delivered to you, sir?

A I don't recall that specifically either, Mr. McInerney. It was delivered, certainly. The copy eventually came to my attention. A likelihood that it was delivered to my assistant at that time, or to someone else in the building, but as I say, the best of my recollection needless to say, and the evidence is there, it was given to me.

Q Now, when your -- I am sorry, go ahead.

A I also recall of course that that quotation that [illegible] was delivered to me, did include a quotation on glass. Here again my recollection is hazy.

I believe that when I heard that there was glass quoted that I called Gordon Tarr again and indicated to him that that particular item should be removed, and this then prompted the recompilation of the quotations without it.

And then of course we scheduled the appointment in Libertyville, that resulted in presentation of the final quotation.

Q Now, just so that the record will be clear, when you spoke of a quotation that included the gallon glass ---

May I have Exhibits 56 and 62?

Is this document which is marked Commission Exhibit 56-A and subsequent letters, the quotation to which you refer?

A Yes, sir.

Q And why did you tell the Borden Company that the gallon glass quotation was not what you wanted?

A Basically we recognized, at least I did, I believe I recall that I was at that time reflecting the opinions of the Chicago Unit, members on my level of management, that we did not want to carry glass private label milk because of the problems at the store level.

Needless to say, it requires more space in the cases, you have the problem of collecting the deposit, making the refund, storing the bottles at the checkout counter, moving them to the back room, assembling them for pick up by the driver-salesman on the next visit to the store.

Basically for that reason we decided to exclude it.

Q Does gallon glass involve any other additional expense to the retail store, in private label?

MR. MATHIAS: Your Honor, I object, unless this witness is shown to be qualified to testify concerning the retail qualification.

MR. MCINERNEY: Well, I think there is an exhibit about this, and you have already questioned him about it, Mr. Mathias.

MR. MATHIAS: Your Honor, I recall no questions put by me to Mr. Schmidt concerning costs.

MR. MCINERNEY: May we have Commission Exhibit 66, please?

Oh, I have it. Thank you.

MR.MATHIAS: Your Honor, before he asks a question, I would like to have a chance to look at this exhibit myself.

All right, fine.

By Mr. McInerney:

Q Would you look at Commission Exhibit 66 and tell us if that refreshes your recollection as to any additional items that were considered when you decided not to take gallon glass in private label?

A Yes, it does, Mr. McInerney.

Q Would you tell us what the additional items were?

A At that particular time glass bottles in the Chicago market area were identifiable with an imprint or a print on the glass bottle itself. Now, this imprint identified the dairy that packaged it and delivered it.

In private label, it would be required of us to have an imprinted glass bottle, that imprint bearing our logo.

Q And who would bear the expense of the imprint of glass bottles?

A It is my recollection that this was discussed with the Borden Company, and we recognized that there would be a cost factor that we in A&P might have to share in; if not in total, in part.

Q Now, were there any other reasons why you were not interested in gallon glass in private label at this time, as best you can recall?

A It is the best of my recollection that returnable glass, whether in milk or beverages, was being replaced in the case of dairy with paper, in the case of beverage of course, with NR bottles.

Q All I want at this point, Mr. Schmidt, is what you discussed with the Borden Company or with Mr. Bartels as to why gallon glass was not acceptable as a private label item?

A I have no other recollection, Mr. McInerney.

Q Now, you also mentioned a second quotation or a final quotation from the Borden Company that you received in Libertyville. And again, for purposes of clarity in the record, I would like to show you Commission Exhibit 62-A, and subsequent numbers, and ask you to look at that and tell us if that is the final quotation to which you refer?

A Yes, sir, this is the final quotation.

MR. MCINERNEY: Your Honor, the witness has been on for well over an hour. If this is an appropriate time ---

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JUDGE HINKES: Very well, we will take a short recess now.

(A brief recess was taken.)

JUDGE HINKES: Mr. McInerney.

By Mr. McInerney:

Q Just before the recess, Mr. Schmidt, I think you had identified Commission Exhibit 62 as the final quotation from Borden which you received at a meeting in Libertyville. First of all, can you tell us why you received it in Libertyville, rather than at your office in Chicago?

A Yes, sir. I was on vacation at that particular time. It was a time my wife was expecting our fifth child, and I recognized the urgency of finalizing the decision, and I indicated to Mr. Bartels that while I was on vacation, I would meet with the Borden Company to secure this final quotation and then submit it to him after I received it.

I recall setting this appointment up with the Borden Company for the VFW hall in Libertyville; I note by the date of the document perhaps several days after the 21st of September.

Q Who was present at that meeting?

A Mr. Ralph Minkler and Gordon Tarr, of the Borden Company, and myself.

Q Would you tell us, please, what was said and done by the participants in that meeting?

A To the best of my recollection, we met, they presented this document and they went over it page by page; they explaining some of it, I observing all of it. We discussed the matter of approximately, the approximate savings involved.

1894

Q Is there anything ---

A I recall that I asked them for a letter indicating that these prices would be offered to others on proportionately equal terms. There was reference by them to the necessity of my saving the competitive bids. I indicated to them that we would.

As I recall, I knew that I was going to submit copies of the quotations, the so-called bids from Bowman, and this Borden bid, to Mr. Bartels, so that, of course, he would have it in his files, and I in mine. That is the sum and substance of my recollection, Mr. McInerney.

Q You mentioned the subject ---

MR. MATHIAS: Your Honor, I would object to Mr. McInerney repeating the witness' testimony in phrasing his questions. I believe that in doing so, we face the risk of getting an inaccurate depiction of Mr. Schmidt's testimony and also that there is the possibility of coaching the witness.

MR. McINERNEY: I don't think that there is anything improper in keeping the continuity. I think if Mr. Mathias had heard my whole question, he would have no objection. By my saying he mentioned a certain subject, and asking him if he can remember anything further with respect to that subject, this I am trying to elicit a memory of some eight years ago.

JUDGE HINKES: State your question.

By Mr. McInerney:

Q You mentioned that there was some discussion of the subject of the savings that would be involved. Can you recall what the substance of that discussion was, on the subject of the savings that would be involved?

A It is my recollection that I wanted to be sure that with the removal of the quotation on glass in the previous quotation, that the savings would nevertheless be reflected in the new quotation.

Q And was there a dollar amount mentioned as to what the savings would be on the assumption that you had the same volume as in the previous year and that you switched entirely to the private label milk and that the Borden brand prices remained the same?

A Mr. McInerney, I would like you to repeat that question, particularly the opening of it, if you can.

Q I am inquiring as to whether there was any discussion or figure mentioned as to the total amount of the saving that A & P might expect to get by accepting this private label offer, in comparison to the Borden brand prices. If I am not making myself clear, I will be happy to rephrase that.

A I would believe, Mr. McInerney, that reference was made to those savings on the strength of the inclusion of it in the document as they presented it to me.

Q The document presented to you, if you will note, on

Commission Exhibit 62-B, mentions a figure of some $830,000. Was there a discussion of whether you would, in fact, save $880,000, if you recall?

A I have no recollection that that was discussed at this meeting, but I would have to believe that there was because of the handwritten letter that I directed to Mr. Bartels in which I make reference to a reduction in that savings because the cost of raw milk had changed from the date that the quotation was prepared for us.

Q May the record show that I am showing the witness Exhibit 66-B, and I ask him whether the second paragraph of that page is the reference to which you have just referred?

A Yes, sir, it is. Yes, sir, it is.

Q And does that refresh your recollection as to whether there was some discussion to the effect that this $880,000 figure was not quite accurate because of an increase in the raw milk cost that would be passed along onto A & P in the private label prices, but that had been absorbed by Borden in its Borden label prices?

A I would have to conclude that this subject as shown on my letter was mentioned at the meeting, yes, sir.

MR. MATHIAS: Your Honor, I would move that the answer be stricken. If he is only testifying as to what his memorandum stated at the time, I do not believe that there is any probative value in his statement.

By Mr. McInerney:

Q Let me ask what your best recollection is, Mr. Schmidt, now that you have looked at the memorandum?

A Mr. McInerney, if I may answer your question this way: That this particular subject, and my report of this particular subject, is the result of the meeting in Libertyville ---

Q Is Commission Exhibit 66, in effect, a report from you to Mr. Bartels of the meeting in Libertyville?

A Yes, sir.

Q All right, sir. You also mentioned that you requested from Borden a letter concerning proportionately equal prices. Did you report that to Mr. Bartels in your memorandum which has been marked Exhibit 66?

RB.

MR. MATHIAS: Your Honor, I object to that question. The memorandum speaks for itself.

JUDGE HINKES: Sustained.

By Mr. McInerney:

Q Will you tell us, Mr. Schmidt, whether you communicated in some way to Mr. Bartels that you had requested a letter of availability, or however you want to describe it, from the Borden Company?

MR. MATHIAS: Your Honor, I object to that as a leading question.

JUDGE HINKES: I will allow the witness to answer.

THE WITNESS: Yes, I did make such a request in my

RB

communication to him dated September 28, Exhibit 66-B.

MR. MATHIAS: Your Honor, I would move that the answer be stricken since the witness is only reading from CX-66-B, which is in evidence, and ---

JUDGE HINKES: The answer stands, in any event. It is responsive to the question as to whether he communicated with his superiors on that subject, and to that extent, it is perfectly proper. It adds nothing, however, to the state of the record.

MR. McINERNEY: I think that in answer, would you read the witness' answer back, Mr. reporter, I think there may have been a misstatement.

(The record was read by the reporter as follows:

"Question: All right, sir. You also mentioned that you requested from Borden a letter concerning proportionately equal prices. Did you report that to Mr. Bartels in your memorandum which has been marked Exhibit 66?

"Answer: Yes, I did make such a request in my communication to him dated September 28, Exhibit 66-B.")

By Mr. McInerney:

Q Had you completed your answer, now that you have heard it read, Mr. Schmidt?

A That is not the answer I intended.

Q Please, just give us your best recollection of whether or not you communicated to Mr. Bartels that you had made a request of the Borden Company for a letter with respect to this offer.

A I communicated my request to the Borden Company in my note, in my letter to him dated September 28.

Q Do you recall having any conversation with Mr. Bartels with respect to this request of Borden for such a letter?

A I recall no conversation with Mr. Bartels, prior to the actual receipt of the letter.

Q At your meeting in Libertyville, do you recall whether anything else was said about this letter from the Borden Company that you requested of Mr. Minkler and Mr. Tarr?

A It is my recollection that they indicated that such a letter would be forthcoming. But here again, I can't be more specific than that because it was eight years ago, but I believe that if there had been any, anything other than that positive indication, I am certain I would have recalled it.

Q You also mentioned that they asked you to save the competitive offer or offers. Was there anything further said on that subject; what did you say to them with respect to that, if you can recall?

A It is my recollection that I informed them that we would, since that was part of our usual procedure.

Q And is that, in fact, part of A & P's usual procedure?

A We keep ---

Q As far as you know?

A --- We keep copies of all quotations received, Mr.

McInerney.

Q Do you recall anything else about this meeting at Libertyville at which you received this final quotation from Borden?

A No, sir, I can't recall anything else, Mr. McInerney.

Q Apart from the reference of saving the competitive offer or offers, do you recall whether anything was said on the subject of Borden Company's competition, or meeting competition?

A I don't specifically recall if at that meeting there was reference to the phrase you used, "meeting competition," or competitive offers. But in the many conversations that I had with Borden, they made reference to any number of subjects. I believe I recall correctly that reference was made to meeting competition or competitive bids or competitive situations, along with what I chose to consider at best salesmen's talk.

The conversations that the Borden Company and I had on this matter of private label milk, in my opinion, were always too protracted. I loaned them an attentive ear but much of it, as I said, I considered in the area of salesmen talk.

Q Did Mr. Mickler or Mr. Tarr attempt to explain in any way the revision that they had made? Let me ask, first, did they indicate that they were embarrassed in any way by making this revision?

MR. MATHIAS: Your Honor, I believe that that is a leading question. It has been asked, but again, Mr. McInerney is putting words in the witness' mouth.

MR. McINERNEY: No, I am trying to refresh his recollection, if there is a recollection to be refreshed.

Let me strike the question and just ask, in your previous answer about salesmen's talk, why did you consider it salesmen's talk?

MR. WHITE: I object to that, Your Honor. When he made that, he was talking about something which was unidentified as to time. He said that these things went on over a long period of time. I think the answer as to why he considered something said to him that isn't even identified as to date or its relationship to this has anything to prove or disprove in this case.

JUDGE HINKES: I don't know that his reference to salesmen's talk was specifically directed to the meeting that he had in September of 1965.

MR. McINERNEY: I don't know either, Your Honor.

JUDGE HINKES: I think that I would have to sustain the objection.

By Mr. McInerney:

Q Can you recall specifically, Mr. Schmidt, can you pinpoint when this reference to competition may have been made?

A I have no recollection that would pinpoint it.

Q Whenever it was, can you tell us why you considered it salesmen's talk?

MR. WHITE: I object to the question.

JUDGE HINKES: I am going to sustain the objection. I think we are reaching, at this point.

By Mr. McInerney:

Q At this meeting in Libertyville, did Mr. Minkler or Mr. Tarr inquire what the price level of the competitive offer or offers that you had might have been?

A No, sir.

Q Was there any discussion with respect to meeting or beating competition, as best you can recall?

MR. WHITE: I object. He has been asked and answered the question already.

JUDGE HINKES: Let the witness answer. I am not sure that that specific question has been answered.

THE WITNESS: Would you restate that question, please Mr. McInerney?

MR. McINERNEY: Would you read it back, please, Mr. Reporter?

(The record was read by the Reporter as follows:

"Question: Was there any discussion with respect to meeting or beating competition, as best you can recall?")

By Mr. McInerney:

Q We are talking now about the Libertyville meeting, Mr. Schmidt.

A Yes, sir, I have it pinpointed to that date.

It is my opinion ---

Q I don't think ---

A I am sorry, it is my recollection that they used the phrase "meeting competition" or "beating competition" as the reason for asking me to make sure that we would save and keep in our files the competitive bids.

Q Do you actually recall that, Mr. Schmidt, specifically?

MR. MATHIAS: Your Honor, I object to that question.

MR. WHITE: He has just testified to it. Now, he is ---

JUDGE HINRES: Sustained.

By Mr. McInerney:

Q What else was said on the subject of competitive bids, if you recall, Mr. Schmidt?

A Again, Mr. McInerney, I don't recall specifically, but as I indicated in previous testimony here, I have the feeling that during this period of time they made reference to it, but again, as I indicated, I considered it salesmen's talk. As a consequence, my memory is not sufficient to indicate when and who said it.

MR. McINERNEY: I think it would be only fair if I am permitted to point out to the witness that ---

MR. MATHIAS: Your Honor, before he makes the statement, I would like the witness excused from the room and I would like to hear what the statement is.

MR. McINERNEY: All right, would you mind, Mr. Schmidt?

THE WITNESS: Not at all.

(The witness left the room.)

MR. McINERNEY: If you would prefer, we can do it off the record.

MR. MATHIAS: I would prefer it on the record.

MR. McINERNEY: All right.

JUDGE HINKES: All right, let's have it on the record.

MR. McINERNEY: I think it is clear, Your Honor, that the witness is confused at this point. He has testified that he couldn't pinpoint any specific discussion with respect to this. And I was simply trying to wrap this up and get rid of the subject, and now he thinks he recalls something, and I am trying to find out what could possibly be the difference between what he is saying now and his reference immediately preceding that, he couldn't pinpoint any discussion with reference to this.

I think it is only fair to point out to the witness that his previous testimony was that he could not recall anything, and now he is attempting to recall something and I would like to find out exactly what it is that he recalls. And I think at this point since the witness appears to be confused, it is fair for me to ask leading questions of the witness.

MR. MATHIAS: Your Honor, I believe that the witness had answered in response to repeated inquiries from Mr.

McInerney concerning the September, late September meeting, that he could recall that the term "meeting competition" was used in connection with the request to save the competing bids.

I don't believe there is any ambiguity or unclarity in the record on that point. What Mr. McInerney is trying to do, he has also stated that in a number of instances, that it seems to him that he has a hazy recollection that the term "meeting competition" was mentioned in a number of meetings with the Borden Company and to this effect.

What Mr. McInerney is trying to do is to attack one statement elicited by him of what I consider to be his own witness, and I believe that it is manifestly improper to allow him to continue and harp and hit at this point. The witness' testimony is clear; there is no ambiguity in the witness' testimony.

MR. McINERNEY: Your Honor, I think it is far from clear. I think that we went through this and he said many times that he could not recall any specific occasion.

JUDGE HINKES: That is true, but his most recent utterance was that he did remember this mention of meeting competition or beating competition.

And he did say that this was in connection with their request to him that he save the competitive bids.

MR. McINERNEY: If your Honor -- I am sorry.

JUDGE HINKES: You may make your argument on the state of his recollection and you may also explore further what else he may remember but it is not at all unusual for a witness to have a hazy memory and then the more he thinks about it, to recollect a detail here or a detail there.

That is not at all inconsistent, and I don't think that we have to belabor that issue. If you wish to explore the issue further, you may, with the witness. But I don't think you can ask him to explain why he remembers now that he didn't remember earlier. I don't think that is going to be productive of any valuable answer.

MR. McINERNEY: I don't know whether it will or not, Your Honor, I have no way of knowing, and all I am trying to do is get at what the facts are.

JUDGE HINKES: He has told us what the facts are. These are now the facts as he states them.

MR. McINERNEY: If you will recall, Your Honor, he prefaced that with the statement that "in my opinion," something or other. I don't remember what it was. And I am trying to show the state of his recollection is unclear. I am trying to establish that as best I can do.

I don't think that Mr. Mathias' statement that the record is clear -- I agree with that to the extent that it is clear that he could not remember any reference to meeting competition.

JUDGE HINKES: I think that all you can be permitted at this point is to ask him once again this is what he recollects, what he has just testified to. If you are not sure that that is the nature of his testimony, you may ask him that. But I think the record will demonstrate that he did say when he was stopped from giving an opinion that his best recollection was thus and so.

If you wish to, once again, ask him whether that is his best recollection, I think that is entirely permissible, but I don't think we should go into that any further.

MR. McINERNEY: Your Honor, I have several questions I wish to ask him on this line.

JUDGE HINKES: We can only deal with them one at a time. I mean, as far as your pending question is concerned, I don't think that is appropriate.

MR. McINERNEY: Very well, Your Honor.

JUDGE HINKES: We will call the witness back in.

(The witness re-enters the room and resumes the stand.)

JUDGE HINKES: You may continue, Mr. McInerney.

By Mr. McInerney:

Q Mr. Schmidt, did you ever report to Mr. Bartels or anyone at A & P thatany reference had been made in your conversation with Mr. Minkler and Mr. Tarr to meeting competition?

A No, sir, I did not.

Q In your written report, which is Commission Exhibit 66,

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is there any reference to it in that report?

MR. WHITE: I object.

MR. MATHIAS: I object to it, Your Honor. The record speaks for itself.

JUDGE HINKES: Sustained.

By Mr. McInerney:

Q Is there any document or other thing that might refresh your recollection with respect to whether or not the subject of meeting competition was mentioned at this Libertyville meeting?

A No.

MR. MATHIAS: I object to the form of the question, Your Honor. If there is any document, let Counsel come forward with it.

JUDGE HINKES: I don't know that the need for refreshing his recollection has been established, Mr. McInerney. You might first ask him whether he does recollect, or whether he has some difficulty in recollecting that subject matter, and then explore it.

By Mr. McInerney:

Q Do you have difficulty, Mr. Schmidt, in reconstructing what was said at this Libertyville meeting, with respect to meeting competition?

A Sbsolutely.

Q Do you have any clear recollection on what was said, if anything, on that subject?

A Not a clear recollection, Mr. McInerney.

Q If something had been said on that subject, would that have been a red light or a red flag to you in any way?

MR. WHITE: Object.

MR. MATHIAS: I object, Your Honor.

THE WITNESS: Not at all.

JUDGE HINKES: Sustained.

MR. MATHIAS: And I ask that the response please be stricken.

JUDGE HINKES: The response is stricken.

By Mr. McInerney:

Q Would you please give us your best recollection as to whether, if such a response was raised, that would have been something that would have stuck in your mind particularly?

MR. MATHIAS: Your Honor, I object.

MR. WHITE: Object to the form of the question.

MR. McINERNEY: Your Honor, I don't know what the objection is.

MR. WHITE: Read the question back.

MR. McINERNEY: Would you read the question back?

(The record was read by the Reporter as follows:

"Question: Would you please give us your best recollection as to whether, if such a response was raised, that would have been something that would have stuck in your mind particularly?")

MR. McINERNEY: I don't think I meant to state that.

JUDGE HINKES: Restate your question.

By Mr. McInerney:

Q I believe you have told us that the subject of competition may have come up at some point in your discussions with the Borden people.

MR. MATHIAS: Your Honor, I object to going through this whole line of testimony again. I don't believe any need has been shown for it. We are going over and over and over the exact same testimony.

MR. McINERNEY: Your Honor, I believe this is a fairly important subject, and I believe we ought to get at the facts.

JUDGE HINKES: It may be important, but that does not justify deviation from ordinary rules of evidence. The witness has answered his best recollection. I don't think you are entitled to attack his recollection.

MR. McINERNEY: I am not attacking his ---

JUDGE HINKES: Because we are certainly treating him as if he was your witness.

MR. McINERNEY: I am not attacking it, Your Honor. He has stated the degree of hazyness of his recollection.

JUDGE HINKES: That is right.

MR. McINERNEY: What I am trying to get at is why his recollection might be hazy on that subject and I think that is

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a fair line of inquiry.

MR. MATHIAS: Your Honor, I believe the witness has stated that on a number of occasions previously, too.

JUDGE HINKES: In any event, if that is your question, I will allow it.

Mr. Schmidt, why is your recollection not perfectly clear and recallable at this time?

MR. McINERNEY: On the subject of meeting competition?

JUDGE HINKES: On that subject, yes.

RD

THE WITNESS: Your Honor, basically my recollection is hazy for two reasons: No. 1, I considered it lightly as a reason for saving the competitive bids.

RD

Secondly, my recollection is hazy because this occurred eight years ago.

JUDGE HINKES: Coming back to your first reason, would the Reproter read that portion of the witness' answer once again? And I would like, Mr. Schmidt, to have you explain that portion of your answer, when you hear it.

(The record was read by the Reporter as follows:

"THE WITNESS: Your Honor, basically my recollection is hazy for two reasons: No. 1, I considered it lightly as a reason for saving the competitive bids.")

JUDGE HINKES: That is all. Would you explain that?

THE WITNESS: I do recall that they asked me to save the competitive bids.

JUDGE HINKES: Yes.

THE WITNESS: And in connection with that recollection, I further have the recollection that they indicated they should be saved -- should be saved for the reason of meeting a competitive situation.

JUDGE HINKES: Very well.

By Mr. McInerney: How clear is your recollection with respect to that?

MR. MATHIAS: Your Honor, I object.

MR. WHITE: Object.

JUDGE HINKES: Sustained. Mr. McInerney, I think we have covered this now to a fare-thee-well.

By Mr. McInerney:

Q Did that remark about saving the competitive bids, did that make any impression on you?

A None whatever.

MR. MATHIAS: Your Honor, I object, as being immaterial and irrelevant.

JUDGE HINKES: Sustained.

MR. McINERNEY: Your Honor, I think it is rather material.

JUDGE HINKES: My ruling is that the objection is sustained.

By Mr. McInerney:

Q You have referred, in your previous testimony, to your questioning into this, further questioning into this testimony. I believe that it has been covered from A to Z and over and over again and I do not believe that after that question there is any further justification for reopening.

MR. McINERNEY: I don't think there is any reason at this stage to curtail my examination in that manner.

JUDGE HINKES: In any event, I don't know what the next question will be. But if there is any objection, I will make my ruling at an appropriate time. In any event, I don't see there is any reason for excluding the witness any longer; but it is 12 O'clock.

MR. MATHIAS: Your Honor, could we go just a few minutes to see if this line of questioning is exhausted; either that, or I would like a ruling Mr. Schmidt may not consult with A & P Counsel over the lunch time.

JUDGE HINKES: Very well. Let's call Mr. Schmidt back in.

(The witness re-entered the room, resumed the stand.)

JUDGE HINKES: Mr. McInerney.

By Mr. McInerney:

Q Mr. Schmidt, I believe you have testified that you did not report to Mr. Bartels or anyone at A & P that the subject of meeting or beating competition had been discussed between you and anyone at the Borden Company.

My question is, can you tell us why you would not have

reported that?

MR. MATHIAS: I object to the form of the question, "why you would not have reported."

JUDGE HINKES: "Why you did not."

MR. McINERNEY: All right, sir.

THE WITNESS: I did not attach any importance to their statement to me. The reason I didn't consider it important is because I considered it as their reason for asking me to keep the bids and that basically the letter that I had requested indicating that the offer would be made on proportionately equal terms, was the only requirement that we would need to accept the quotations as submitted to us.

By Mr. McInerney:

Q Can you recall any other reason why you did not report any such subject to anyone at A & P, if you can recall?

A It is only through this kind of interrogation, Mr. McInerney, that I suddenly become aware of the apparent importance of this statement. I certainly under no circumstances knew the significance of it at the Libertyville meeting, or in subsequent months and years.

MR. WHITE: Your Honor, I move to strike the answer as not responsive to the question.

MR. McINERNEY: No, I think it is.

JUDGE HINKES: Whether the answer is responsive or not is something for Mr. McInerney.

you get the answer of the witness?

(The record was read by the Reporter as follows:

"Answer: Yes, sir.")

By Mr. McInerney:

Q And what did you do with that letter, Mr. Schmidt?

A It was transmitted to Mr. Bartels' offices.

Q Did Mr. Tarr or anyone from Borden, during the course of your negotiations with them on private label milk, ever indicate to you that the prices that A & P was being quoted would not be made available to others?

A No, they did not.

Q Did they indicate to you that the Borden quotation was not cost-justified?

A I do not recall that they said that.

Q When you received that quotation and the letter that you have already testified to, that you passed it along to Mr. Bartels, A & P Exhibit 2, how did you send them to Mr. Bartels, do you recall?

A I do not specifically recall how that was transmitted to Mr. Bartels.

Q I would like to show you an exhibit in evidence as Commission Exhibit 263-A, and ask you to look at it and see if that helps to refresh your recollection as to what it was you transmitted to Mr. Bartels.

A I notice that in this particular document that Mr. Bartels forwarded to Mr. Smith, the letter of Mr. Tarr dated October 1 in reference to my request, is attached.

Q Do you have a letter that will identify that?

JUDGE HINKES: 263 ----

MR. McINERNEY: Is it H?

JUDGE HINKES: It looks like it could be H. It is rather blurred, that is all I can say.

MR. McInerney: Thank you, Your Honor.

MR. MATHIAS: It is "H", sir.

JUDGE HINKES: Very well.

By Mr. McInerney:

Q Apart from the cover page, which is indicated as Commission Exhibit 263-A, would you tell us whether the rest of that Exhibit, all of the subsequent pages, were what you transmitted to Mr. Bartels, as best you recall?

A Yes, it is my recollection that I transmitted everything except that first page to Mr. Bartels.

Q When you did that, do you recall what your state of mind was with respect to whether the Borden quotation was cost justified? In other words, Mr. Schmidt, if I may define what I mean by that, just for purposes of clarity, that the reduced prices to A & P reflected savings in cost to Borden, in the quantities and methods of delivery by which they would be supplying private label milk to A & P from their Woodstock plant?

MR. MATHIAS: Your Honor, I am going to object to that question. There has been no foundation laid for that question.

MR. McINERNEY: The purpose of the question, I think it goes to the good faith of the witness and the Company in reviewing this quotation, Your Honor. I don't think any foundation needs to be laid for it.

JUDGE HINKES: It seems to me that the question should be answered. I am not at all sure that this witness' understanding would be particularly pertinent, but nevertheless, I will allow it.

THE WITNESS: It is my recollection that I believed that this quotation was given to us on cost justification, that through the reduction of services of one kind and another to our stores, with the operation of that new Woodstock plant, which I understood to be one of the most modern, if not the most modern in the world at that time, that the opportunities of saving monies were there for the Borden Company.

By Mr. McInerney:

Q Was the efficiency of the Woodstock plant a matter that you discussed with representatives of the Borden Company prior to the submission of this quotation?

A It was discussed in general terms. They were extremely proud of it, needless to say. I personally recall riding past their old North Tripp Avenue plant twice a day on the commuting train. I observed the condition of that plant and could visualize and appreciate the improvements in processing, handling milk through a modern plant such as Woodstock.

Q Do you recall whether the subject of palletization of milk deliveries was discussed by representatives of the Borden Company prior to the submission of this quotation?

A I was aware that palletization of milk was in use at Woodstock. I do not specifically recall, however, that it became part of this request or presentation of their quotations, Mr. McInerney.

Q Sir, when you transmitted these quotations to Mr. Bartels, what was your recommendation or your opinion with respect to the relative merits of the Bowman bid vis-a-vis the Bowman bid?

MR. MATHIAS: Your Honor, I object to the question. I think the documents speak for themselves and any transmittal letters or memos.

JUDGE HINKES: The documents may speak for themselves but that doesn't necessarily reflect the attitude of the Company involved.

I will allow the answer.

THE WITNESS: Mr. McInerney, it is my recollection that I considered the Borden bid to be a better bid than the Bowman bid.

By Mr. McInerney:

Q Sir, at that time, did you examine these quotations in great detail, and analyze them in great detail?

A I did not examine them in the detail at that time that I have since that time, and the examination since that time, of course, has been most recent.

Q Have you examined the two together recently, at my request?

A Yes, I have, Mr. McInerney.

Q And what is the result of that examination?

A Basically, I find that the Bowman Dairy quotation was predicated on a higher cost of raw milk, and a higher butterfat content. And that the Borden Company quotation, of course, was at a different level, and no consideration was given to the distinction.

And that basically if the Bowman Comapny had -- Bowman Company's quotation had been constructed to the same levels of butterfat content and to the base cost of raw milk, that the net result would have been a more -- it would have resulted in a quotation from the Bowman Company that would have very closely, very closely, approximated the Borden bid.

Q Would teh unit cost of the quart, half-gallon and gallon in the Chicago-Calumet area, in the Bowman bid, with the adjustments to which you have referred, have been lower or higher than the unit cost for those items that the Borden quotation shows?

A The Bowman quotation on quarts, half-gallons and gallons of Homo milk would have been lower from the Bowman Company.

MR. McINERNEY: Would you read that answer back, please?

(The record was read by the Reporter as follows:

"Answer: The Bowman quotation on quarts, half-gallons and gallons of Homo milk would have been lower from the Bowman Company.")

THE WITNESS: I erred, then. It should have been answered that the quotation on quarts, half-gallons and gallons, adjusted, would have been lower from the Bowman Dairy Company.

JUDGE HINKES: Than Borden?

THE WITNESS: Than Borden, yes, sir.

By Mr. McInerney:

Q And I believe that you told us that the Bowman quotation was for either private label or Bowman label.

A Yes, sir, that is correct, and basically we overlooked that aspect in recommending to the Divisional Office, Mr. Bartels, that we purchase private label from the Borden Company.

Q Sir, do you have before you Commission Exhibit 56 for identification?

Pardon me, in evidence. If you do not, I will give you a copy of it.

Looking at Commission Exhibit 56 for identification, does that give a quotation for brand label milk in the gallon jug?

A Yes, it does.

Q And would you compare that quotation for brand label milk in the gallon jug with the quotation that the Bowman Dairy gave you?

MR. MATSIMS: Your Honor, I would object to this witness making a comparison between two exhibits in evidence.

MR. McINERNEY: Your Honor, I think I can shorten this, if you like. I think there is no problem with his looking at these. I am trying to make sense out of the documents because there are hundreds of pages here, and I am trying to ask the witness, basically, to compare the two quotations.

And I think that, as a matter of fact, let me try it without the documents, if that is what the objection is.

By Mr. McInerney:

Q Mr. Schmidt, have you at my request compared the Borden quotation for brand label milk in the gallon jug, with the Bowman quotation, for brand label or private label milk in the gallon jug?

A Yes, I have. I ---

MR. MATHIAS: Your Honor, I object. The item that is being discussed now was not even included in the negotiations. Mr. Schmidt has previously testified that the glass gallon jug was eliminated from the negotiations and from the final offer herein, because they did not want the gallon jug in the private label.

MR. McINERNEY: The quotation from the Bowman Company includes a quotation on the ballon jug, and that is what was compared with the quotation from the Borden Comapny. Previously, the Borden Company had quoted the brand label price on the gallon jug. A & P was currently paying that price on the gallon jug from Borden and I submit it is obviously relevant.

JUDGE HINKES: Did not both Companies also quote at that time a price on the gallon containers not in the jug?

MR. McINERNEY: Yes, sir, but what I am getting to is a comparison between the glass gallon jug, in the Bowman quotation, vis-a-vis, what A & P was paying Borden for its glass gallon jug, which it was purchasing from Borden at that very time, in order to compare the two quotations, and the savings that might result.

JUDGE HINKES: Very well; you may continue.

By Mr. McInerney:

Q What was the result of your comparison of the Bowman quotation on the glass gallon jug, and the Borden prices being charged to you for the glass gallon jug at that time?

A The Bowman quotation was ten cents-plus, a gallon cheaper.

Q And approximately what was the order of magnitude of the A & P's purchases of the glass gallon jug from Borden at that time?

A On an annual basis, approximately one million gallons.

Q And from that, what would you conclude would have been the cost saving to A & P from acceptance of the Bowman quotation on the glass gallon jug?

MR. MATHIAS: Your Honor, I object to this line of questioning. The Exhibits are here, the pricing is here, it is all in evidence. It has been stated by the witness that the glass gallon jugs were specifically excluded from the final quotations on private label, at Mr. Schmidt's own request. I don't see relevancy of this line of questioning at all.

MR. McINERNEY: Your Honor, that is a matter for argument later on.

JUDGE HINKES: Mr. McInerney, is there any necessity for the witness reading the document to me? Can't that be done by me and presumably in your argument you make in your brief, in which you will specify the matter you are referring to in the documents?

MR. McINERNEY: Your Honor, he is not reading now. He has already made a comparison and I think he had given us a comparison from which the arithmetic necessarily follows.

JUDGE HINKES: I understand.

MR. McINERNEY: And I think Mr. Mathias is impeding the examination by not letting the witness complete his answer to the question.

JUDGE HINKES: Let me put it this way, Mr. McInerney, I do not wish to have any witness simply tell me his mathematical calculations on a document which I can determine for myself.

MR. McINERNEY: Your Honor, I think it goes beyond that. The witness is, I have asked the witness and he has testified that I have, to compare what he was paying, what A & P was paying Borden for the glass gallon jug with what the Borden offer was on the glass gallon jug.

He has stated they made the comparison, and that it showed ten cents-plus per gallon, and that the purchases were approximately a million gallons per year. I am simply asking what the saving would have been to A & P by reason of that fact alone. I don't see that there should be much argument about it.

JUDGE HINKES: Very well, go on. I just don't think there is much point in pursuing that line of inquiry if it is ascertainable by others independently of this witness. That is all. But you may continue.

MR. McINERNEY: Thank you. I thought it would be really quicker at this point, Your Honor, if we could just put this figure in the record at this point.

By Mr. McInerney:

Q Did you tell us, Mr. Schmidt, what the savings would have been from A & P from accepting the Bowman quote on the glass gallon jug?

A That saving would have approximated $100,000 a year.

Q Thank you. On that one item alone?

A Yes, sir.

Q Sir, in your direct testimony, I believe that you mentioned that Mr. Goss of the Borden Company at one point in time told you that Borden was supplying private label milk to a customer by the name of Eagle Stores. Is that correct?

A That is my recollection, Mr. McInerney.

Q And what is it that you recollect about that, what causes you to recollect that?

A It is my recollection that Mr. Gose came in one day with a lower quotation on private label milk, for our stores in the Waukegan, Northern Illinois section, and he indicated that these prices were being lowered to us because they had acquired a private label business at the Eagle chain.

Q Where did the Eagle chain operate?

A Their headquarters basically were in Milan, Iowa, a suburb of the Quad City general area. They have stores in Iowa and in the Northern section of Illinois, Rockford and as far East as Waukegan.

Q And was the reduction to A & P only in those areas where Borden was supplying private label milk to A & P and the Eagle stores were also operating?

A That is my recollection, yes, sir.

Q And was this a reduction that was not solicited by you in any way?

A That is right.

Q Apart from receiving information such as this from Mr. Gose, do you recall any other instance that led you to believe that you were paying Borden more for private label milk than other people were paying for their milk, if you recall?

A Would you mind restating that question, Mr. McInerney, please?

Q Yes, sir. After the private label arrangement went into effect, and Borden was supplying private label to A & P, apart from this incident with respect to the Eagle stores, did anything else happen that you can now recall that led you to believe that you were not getting the best possible price from the Borden Company?

A They would be in the area of speculation, Mr. McInerney. Nothing specific that I can recall.

Q Do you recall any conversations with a Mr. James McMahon?

MR. MATHIAS: Your Honor, I believe that if this is probing the witness' area of speculation, that it would be objectionable.

MR. McINERNEY: It is an attempt to refresh his memory. If it cannot be refreshed, I will drop the subject.

JUDGE HINKES: You may continue.

THE WITNESS: I do recall having conversations with Mr. McMahon, yes sir.

By Mr. McInerney:

Q And does that help to refresh your recollection as to whether there might have been lower prices obtainable, than you were paying Borden for private label milk?

A He intimated to me that in his opinion ---

MR. MATHIAS: Your Honor, I am going to have to object to this line of questioning. There has been no identification of Mr. McMahon, what the circumstances of this conversation were. I am afraid that it would have to be considered the

By Mr. McInerney:

Q Would you like the question reread or restated?

A Yes, please.

Q Do you know whether it was public knowledge what dair such as Borden would charge chain store customers, includi any discounts, in other words, what the net price would have been?

A No, I did not know.

Q You did not know the prices, or, in other words, what I am asking you is: do you know whether or not the dairies prices to the chains in general were common knowledge, but what net prices the dairies charge chains?

A That was not common knowledge.

Q And did you personally have such knowledge?

A No, I did not.

Q Now, sir, you were shown on your direct examination Commission Exhibit 102, and at that time I tried to ask yo something with respect to certain markings at the bottom of it. Again I would like to get a copy that has no other notations.

JUDGE HINKES: You may use this one, if you lik

MR. McINERNEY: Thank you, sir.

By Mr. McInerney:

Q Would you look at Commission Exhibit 102B, if you ple

A Yes, sir.

Q I think you testified that the handwriting at the bottom of that page was yours, the handwriting that concludes "can be substantiated".

A Yes, sir.

Q Now, where did you get the information that this could be substantiated?

A It is my recollection that I received that information from Mr. Gose.

Q And did you simply write down what Mr. Gose told you, or were you able to substantiate it some way yourself?

A No, I merely wrote down what Mr. Gose had indicated.

Q Now, can you tell us in this private label arrangement with Borden, I think you testified that at one point there were some Iowa stores of A&P that might have been served with private label by Borden, but that they were stricken out. Do you recall that yesterday?

A Yes, sir.

Q Now, my question is: was all of Iowa eventually excluded from this private label arrangement?

A Yes, sir.

Q Now, in the course of these negotiations, or otherwise, did you or did anyone from A&P in your presence ever discuss with anyone from Borden the retail price at which A&P would sell private label milk or other products out of A&P stores?

A No, sir, they did not.

MR. McINERNEY: May we have a short recess, Your Honor?

JUDGE HINKES: Very well. Take a short recess at this time.

(Brief recess.)

MR. McINERNEY: We have no further questions.

JUDGE HINKES: Mr. White.

By Mr. White:

Q Mr. Schmidt, I believe during the course of your testimony for the last approximately two days you mentioned that during the negotiations with Bordon concerning the private label that you dealt with Gordon Tarr, Ralph Minkler and Joseph Malone. Is that correct?

A Yes, sir.

Q Not all at the same time, but at one time or another?

A Yes, sir.

Q In your dealings with Gordon Tarr, did you find him to be honest and forthright?

A Yes, I did.

Q Would the same be true of Mr. Minkler?

A Yes, sir.

Q And Mr. Malone?

A Yes, sir.

Q Isn't it true that during these negotiations that you observed that Bordon was not eager or anxious to quote on part he should get in touch with us.

Here, again, Mr. White, I am trying to remember what else that particular note of mine contained about that conversation. I do recall that I did make some specific comments.

Q Without reference to a particular day, would this have occurred after you had received notification that a proposal had been given for Borden to be the supplier?

A That is my recollection, that after I had received indication from Mr. Bartel's office that the Borden quotation in private label was acceptable, it was then that I contacted Frank Cannon.

Q So that between your initial conference with him regarding Commission Exhibit 50 and the time when you notified him that Bowman's proposal had not been accepted, you had no other meetings or contacts with any other representatives of Bowman?

A That is the best of my recollection, yes, sir.

Q Now, did you at the time and shortly after receiving Commission Exhibit 50 consider it a serious proposal?

A Yes, sir, I did.

Q One worthy of consideration by A&P?

A Yes, sir.

Q And was it actively being considered by you?

A Yes, sir.

Q Now, in your meeting with Mr. Cannon, did you ask him to supply a letter stating that these prices being offered by Bowman were proportionately equally available to Bowman's other customers?

A I have no recollection of that, Mr. White.

Q Or did you ask of him a letter of any other kind justifying or relating to the pricing that they were offering?

A I don't recall that I did at that initial meeting, no, sir.

Q Well, did you at any time?

A No, sir, I didn't.

Q Yesterday you were shown a copy of Commission Exhibit 13, which is the Borden proposal dated May 25, 1965.

A Yes, sir.

Q Who delivered that document to you?

A I would believe it would have been Mr. Gordon Tarr.

Q Was he accompanied by Mr. Malone?

A I do not specifically recall.

Q Do you recall any meeting with Mr. Malone concerning in any way the private label matter other than the meeting you have described where, as you put it, they came to your desk and discussed with you the comparison of Chicago and New York costs?

A That is the only meeting, Mr. White, that I personally recall.

Q Now, during the course of your testimony I believe that the only meeting with Mr. Minkler that you referred to was the one in Libertyville.

1965 that you at that time requested Borden to supply a letter concerning the availability of pricing. Do you recall your testimony in that regard?

A Yes, sir.

Q Are you quite certain that that transpired at that meeting, or could that have happened on another occasion?

A I believe that it transpired at that meeting, Mr. White.

MR. WHITE: Thank you.

That is all.

JUDGE HINKES: Mr. Mathias.

MR. MATHIAS: No redirect, Your Honor.

JUDGE HINKES: Any further examination, Mr. McInerney?

MR. McINERNEY: No, Your Honor.

JUDGE HINKES: Thank you, Mr. Schmidt. You may step down.

THE WITNESS: Thank you.

(Witness excused.)

MR. MATHIAS: Your Honor, we discussed at the break with A&P Counsel the question of whether we would put Mr. Bartels on in the event Mr. Schmidt's testimony ended before 3:30, and decided we would. However, I think A&P Counsel had to contact Mr. Bartels and have him come over.

MR. CURNIN: We have contacted him, Your Honor, and he is on his way over, and I think he would be here at least through X and ask you to glance through these pages and familiarize yourself with them, please.

Are you familiar with these records?

A Yes.

Q What are they, Miss Seidl?

A Worksheets.

Q And what kind of worksheets?

A For figuring the rebate or discount to the customer.

1934

Curnin's questions, you were -- had not -- you were not sure you had seen these particular sheets before.

Have you seen similar records of the Borden Hammond branch upon occasion during the course of your duties?

A Yes.

Q And are you familiar with records of this type?

MR. CURNIN: May I have that question?

JUDGE HINKES: Would you read it back, please?

(Question read.)

THE REPORTER: Do you want the one before that?

MR. CURNIN: Yes.

(Desired portion of record read.)

By Mr. Mathias:

Q Records such as 288A through X.

A You are confusing me. May I say something, please?

Q Yes.

A I am familiar -- when you say I am familiar with these records, yes, I am, because this and this (indicating), that sheet there (indicating)is the same thing.

JUDGE HINKES: Now, which sheet are you referring to?

By Mr. Mathias:

Q You are talking now about --

A They are both the same. These are all, in my mind these are all the same thing.

This is to figure the rebate (indicating); this is to figure the rebate (indicating); this is a worksheet (indicating), and this is a worksheet (indicating He would figure this (indicating), and then this (indicating) would be typed on here (indicating).

Q Now, when you say the "here" this is 288A through O you were handling, and the other sheet to which you were referring was 289A through C; is that correct?

A Yes.

You see, he -- he would do his own figuring. He did his own typing. When I did it, then I -- I -- that is why I had -- I am familiar with this (indicating) because I did my own figuring and put it right on there (indicating).

Q Now, when you state "he", you are talking about Mr. Williams --

A Right.

Q -- in connection with CX288?

A He did this (indicating), and then he did this (indicating) himself.

Q And in connection with CX289, you did -- that is the document to which you refer. You did that yourself.

A Right.

data contained therein, or what?

MR. CURNIN: No, responsible for the custody of the records.

THE WITNESS: Well they stayed in his files.

By Mr. Curnin:

Q They stayed in his files?

A Right.

Q And his files are not with your files?

A No.

Q No.

Now, I show you CX 288-P through X, the document which you have seen before, and I ask you now can you tell us if that is a, consists of a series of documents from the Borden files?

A Yes.

Q These documents do come from the Borden files?

A Yes.

Q And when did you first see those documents?

A I don't remember.

Q How are you able, then, to tell us that they are documents from the Borden file?

A Because it's the same thing as those, that other document (indicating).

Q Do you mean it looks like 288-A through O? Is that your testimony, Miss Seidl?

PROCEEDINGS

JUDGE HINKES: The hearing will be in order.

I believe we have a witness scheduled for this morning. Are you to conduct the examination, Mr. Stone?

MR. STONE: Yes, sir.

JUDGE HINKES: Very well, you may call your next witness.

MR. STONE: I call Herschel Smith.

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XXX HERSCHEL SMITH was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

XXX DIRECT EXAMINATION

JUDGE HINKES: Would you state your name, please?

THE WITNESS: Herschel B. Smith.

By Mr. Stone:

Q Mr. Smith, could you please give us your current home address?

A Yes, it is 19 Carriage Road, Cos Cob, Connecticut.

Q And are you presently employed?

A No, I retired on January 31 of this year from A & P. Prior to that, I was the National Purchasing Director, from December, 1970 to my retirement at the end of January, 1973. Prior to that, from 1962 to 1970, I was Headquarters Dairy Buyer.

Q And where were your offices located?

A 20 Lexington Avenue, New York City.

Q And during your tenure as National Director of Purchases, what were your duties?

A The duties made me responsible for purchasing ultimately all the merchandise sold in A & P stores, other than that produced or manufactured by the subsidiaries of A & P.

Q Other than those ---

A And excluding generally those items which are of a local nature which are bought locally.

Q And at the same time, did you have a title with the Corporation?

A National Purchasing Director was the title.

Q Were you also a Vice President of the A & P Corporation?

A No, I was not.

Q And was the Lexington Avenue address you mentioned sometimes known as the Graybar Building?

A That is right, that is the name of the building.

Q In your previous position as Headquarters Buyer for Dairy, what product lines did that entail?

A It included a great bulk of the dairy business, principally fresh milk and ice cream and associated items such as evaporated milk and instant breakfast and dairy creamer and that sort of thing. It did not include cheese, which was taken care of by a cheese department in another section of the Company.

So that it wasn't everything in the dairy line, but it was the milk and ice cream portion of it largely.

Q And by the milk portion, do you include things such as sour cream ---

A The byproducts, yes, sir.

Q And cottage cheese?

A Yes, sir.

Q And when you mention some other dairy products such as evaporated milk, did you also purchase dry milk, the dry evaporated milk? Powdered milk?

A The powdered milk was bought in one of the field-buying offices. Evaporated milk was manufactured by one of our subsidiaries to a large extent, but it was my responsibility to purchase the nationally advertised brands of evaporated milk and any private label evaporated milk that may be needed to supplement our manufactured products.

Q Were you also familiar, in a general way, with your own manufacture of evaporated milk?

A Not directly. It was a separate section of the Company. It didn't come through my hands as a regular thing, no.

Q I see. But was it part of your duties to be generally familiar with your production volume of this sort of milk?

A No.

Q Was it your duty to make some sort of analysis as to whether it would be economically feasible to manufacture milk or to buy outside brands?

MR. McINERNEY: You said evaporated milk, Mr. Stone?

MR. STONE: Yes, sir.

MR. McINERNEY: I am not sure evaporated milk has anything to do with the proceeding. I don't want to interrupt on that basis ---

MR. STONE: I was just trying to establish the breadth of the gentleman's duties.

THE WITNESS: I don't believe so. I don't believe that ever happened.

By Mr. Stone:

Q As a Headquarters Buyer in New York, to whom did you report, and I believe you mentioned the period 1964 through 1969?

A The National Purchasing Director at that time, Mr.Corbus; at the earlier stages, Mr. Hornberger at a later date; and Mr. Moss at a date following that.

MR. STONE: Mark for identification Commission Exhibit 258.

XXXXX (The document referred to was marked Commission Exhibit 258 for identification.)

By Mr. Stone:

Q Mr. Smith, I hand you Commission Exhibit 258 which has been prepared by A & P Counsel, and point out to you the box entitled, "VP National Director of Purchases." In handing this exhibit to you, I would note that it is entitled "A & P

Organizational Chart, ~~Mid-Western~~ Middlewestern Division and Chicago Unit, 1965 - 1966," and was originally prepared by A & P Counsel.

Mr. Smith, returning to my question, I point out to you the box entitled VP National Director of Purchases, and the line down to the ~~Mid-Western~~ Middlewestern Division Director of Purchases.

A Yes.

Q Did the ~~Mid-Western~~ Middlewestern Division Director of Purchases repo to you?

A Are you inferring did the middle Western Division Direc of Purchases report to the National Purchasing Director?

Q Yes.

A In that period of 1965 - 1966, yes, he did.

Q I see. Did he also report to the field-buying office, which is indicated in the box over here, at the national lev for the particular product he was currently interested in?

A No, he wouldn't report to him. The Middle Western Divi National Purchasing Director would report to his President i the Middle WEstern Division and to the National Purchasing Director in New York.

Q I see. And I take it, the Unit Buyer at the unit level for a particular product would report to his own President?

A To his own Purchasing Director, as this line indicates. The Unit Buyer will report to the Divisional Purchasing Dire

Q Perhaps we can do this a little better without the char at the moment anyway. When you were a Headquarters Buyer an you had some responsibility for various dairy product lines, did you do the buying for the entire country?

A No.

Q Did you do the buying for the New York Metropolitan Area?

A Yes, I did.

Q Did you do the buying for the Northeast Area?

A No, my direct buying was confined to Metropolitan New York.

Q I see. Did you supervise those making milk and dairy purchases in other areas of the country?

A Yes, I was a consultant available for consulting and advising to those Purchasing Directors on the outside who wanted to talk to me about the buying of milk and those associated products under my jurisdiction.

Q Did you consult with them frequently?

A Yes, as often as the occasion came up.

Q Did The Great Atlantic and Pacific Tea Company in 1964, 1965 and 1966, break its selling functions, its corporate structure, down into a number of divisions throughout the United States?

A No, that happened at a different date. In 1964, 1965 and 1966, the Corporation had seven Divisions, and under those seven Divisions, were 32 units who reported to those seven Divisions. Someplace in that period, one of those Divisions was closed or combined, and there were six, and then subsequently, two others were combined and there were five, and I suspect that at the end of the period you just mentioned there, that there probably were five in and around 1966, but in 1964, there were seven.

Subsequently, we did make a further change.

Q And how did the chain of command go from unit to Division to National Headquarters?

A It was the same after two of these Divisions were combined. These unit people simply reported to a different Purchasing Director.

Q I take it from your answer, that the unit officers reported to the Divisional Officers, who in turn, reported to the National office?

A That is correct.

Q And was there any communication from the unit level to the national level?

A Very little.

Q Tell us if you know, how many stores the A & P Tea Company had in 1964, very approximately.

A In the vicinity of 4400.

Q And can you tell us where these stores were located?

MR. McINERNEY: I think that is a difficult question for anyone to answer, Your Honor.

JUDGE HIMMES: Yes.

By Mr. Stone:

Q Were they located throughout the continental United States and Canada?

A I can give a rough approximation of where they were. The figures are available if you would rather get the accurate information. I think they could be looked up and the actual figures given to you. We had very little operation in the West Coast and California, 31 stores there, and I believe up in the Northwest, we had something like 22 stores and that was the entire Western section of the United States so we were very poorly represented out there.

The East and along the East Coast is where the bulk of our stores lie and mostly we are east of a line from Dallas to Chicago.

Q I see. Was The Great Atlantic and Pacific Tea Company, in about the period 1965, the largest grocery chain in the United States, in terms of sales volume?

A Yes, sir.

Q Perhaps, Mr. Smith's comment that some of this general information is best gotten if published sources might be taken advantage of. The reason I have gone into that question at all is that while A & P appears to have admitted the authenticity of Borden's annual reports, I don't believe that Borden has admitted the authenticity of A & P's annual reports.

We might speed it, the procedure at this point, if we just asked if Borden denied the authenticity of these reports and held for another time, the problem of relevance in the introduction of these documents.

MR. WHITE: We have no question about the authenticity of A & P's annual reports.

MR. STONE: And I would add one prospectus, which I think is CX-217.

MR. CUFNIN: 218.

MR. STONE: 218.

MR. WHITE: We don't deny that it is a prospectus of A & P, if that is the question we are being asked. As to the facts therein, that is another matter, but as far as it being what it purports to be, namely, a prospectus apparently filed with the SEC by A & P, there is no question about that.

And the same with the annual report, we don't question that the annual report is what it purports to be, namely, an annual report of A & P. But by saying that we do not concede that it is relevant, or that proves the facts stated therein.

MR. STONE: I would think that that admission would be sufficient for our purposes at this time, Your Honor.

JUDGE HINKES: Very well.

By Mr. Stone:

Q Mr. Smith, do you have any knowledge as to the geographic coverage of A & P's Division in the Chicago area? The middle Western Division.

MR. McINERNEY: I just wanted, if I might, to clarify a point. I think Mr. Stone is aware the word "Division" changes definition from time to time during this period. And when the witness spoke about a division at a certain period of time, it means one thing, and at a later period of time, it means another.

I didn't mean to interrupt you, Mr. Stone, but if you would give a year or something like that, I think it might be helpful.

By Mr. Stone:

Q During the year 1965.

Would you like the question read back?

A Yes, please.

(The record was read by the reporter as follows:

"Question: Mr. Smith, do you have any knowledge as to the geographic coverage of A & P's Division in the Chicago area? The Middle Western Division.")

THE WITNESS: Yes, generally I know about the territory that it covered, yes.

By Mr. Stone:

Q Would you tell us what territory it did cover?

A Yes. It covered the Metropolitan Chicago Area, Illinois, up to approximately the Wisconsin line, south into Indiana to approximately South Bend, and south into Illinois to a point that did not include Springfield and Peoria.

Springfield and Peoria were out of St. Louis, so there is an imaginary line across the State of Illinois north of Springfield and Peoria which would be a proximate dividing line of the territory that the Chicago Division encompassed.

MR. McINERNEY: Excuse me.

MR. STONE: So you are speaking of the Chicago Division, is that right?

JUDGE HINKES: Would it be Chicago unit or Division in 1965?

THE WITNESS: It was the Chicago Unit in 1965, sir.

JUDGE HINKES: Very well.

MR. STONE: The Chicago Unit?

THE WITNESS: Yes, sir.

By Mr. Stone:

Q Did the Chicago Unit extend into the State of Iowa?

A Excuse me, I should have remembered that. It included the tri-cities and about a dozen stores to the Eastern section of Iowa, mostly in the tri-cities area.

JUDGE HINKES: What cities are those?

THE WITNESS: Moline, Burlington, and I am sorry, sir, there is a third one, there is a little group of three towns, they are close to each other and I can't recall the third one of those.

MR. WHITE: I think I can clarify that, being from that area. It is Davenport, Iowa; Moline, Illinois and Rock Island, Illinois.

JUDGE HINKES: Does that sound right?

THE WITNESS: Yes, sir, that is right.

By Mr. Stone:

Q I take it you have been speaking of the Unit or Division entitled the Chicago Unit or Division?

A Yes.

Q Was this -- and using the word unit at this time -- was this Chicago Unit part of a larger ~~mid-Western~~ Middlewestern Division?

A Yes, it was.

Q And could you describe for us the geographic coverage of that Division?

A Yes. In 1965, is this what you are talking about now?

Q Yes, 1965.

A One of the other Units would be Milwaukee; another would be Kansas City; another one would be St. Louis. That is all.

Q Could you tell us the States encompassed by the ~~mid-Western~~ Middlewestern Division?

A This will have to be a proximation, because this is something that I don't have at my finger tips, but the Milwaukee Division is largely the State of Wisconsin, but includes one or two stores in Minnesota and some stores in Michigan, in the upper peninsula, they call it, up toward into St. Mary, as you cross the Wisconsin line into upper Michigan that is part of the Milwaukee Division, so there would be three States there.

In St. Louis, St. Louis had the Southern portion of

Illinois, the Eastern half of Missouri, and I don't believe they went into any other States. Kansas City, they had the WEstern half of Missouri, all of the stores in Kansas, some of the stores in Iowa and all of the stores in Nebraska.

Q Did you mention another Unit in Indiana, or perhaps Michigan?

A If St. Louis has any stores in Indiana, well then, I just don't happen to be aware of that. I didn't think so, but it is possible.

Q Was the lower peninsula of Michigan part of the ~~mid-Western~~ Middlewestern Division?

A The upper peninsula, they call it out there, the part that is up in the Northwestern part of the State of Michigan, that is called the Upper Peninsula, and there are stores up there, a dozen or so. Those come under the jurisdiction of Milwaukee and they are part of the Middle Western Division.

Q But did the A & P Middle Western Division also have jurisdiction over A & P stores in the lower peninsula of Michigan?

A No, those were under the Detroit Unit and that was not part of the Middle Western Division at that time.

Q Who was the dairy buyer with the position equivalent to yours in the Middle Western Division at the period 1965?

A I understand that Elmer Schmidt, the buyer of the Division, handled that account himself. I believe he did the buying.

Q Did Elmer Schmidt report directly to you?

A No, he did not.

Q Was he then the Chicago Unit buyer?

A He was the Chicago Unit buyer.

MR. McINERNEY: I think confusion is that the Unit was later called the Division.

MR. STONE: Perhaps for clarity, we could henceforth use the word Unit to refer to the Chicago branch of the A & P Tea Company and the word Division to refer to the Middle Western or larger Unit of A & P.

MR. McINERNEY: Which is accurate as of the year 1963, yes.

By Mr. Stone:

Q So Mr. Schmidt was the Chicago Unit Dairy Buyer?

A Yes.

Q And who was his superior and who was the person with the equivalent position in the Middle Western Division?

A That was Ira Bartels.

Q Did he report to you?

A Yes, he reported to me, and his Vice President in charge of the Middle Western Division.

Q And who was that?

A Edward Vogel.

Q Mr. Smith, what was the extent of Mr. Bartels' and Mr. Schmidt's authority? Could they initiate a private label milk arrangement by themselves?

A Yes, they could.

Q Could they commence selling private label milk in the Chicago area, for instance, without obtaining the approval of your office?

A No, they had to come through Headquarters for approval, to be sure that the arrangement was satisfactory.

Q What do you mean by satisfactory?

A To see that it was properly put together, to see that it was legal, to see that it was a good move for the Company and to be sure that the Supplier they had was a reliable Supplier and that he was a reputable quality Supplier.

Q And I take it from your answer, this, these decisions were made by the New York office?

A The material was gathered, the material for this was gathered by the Division and sent to us and these are simply the overall reasons why they won't just be allowed to put on a private label milk program without any approval.

Q Did you make the final decision, then, that these factors had been established and that these prerequisites had been complied with?

A Yes, sir.

Q Paraphrasing you, I believe you mentioned that you had to be sure that the private label arrangement, which might be initiated, made sense for the Company.

A Yes.

Q What did you mean by that?

MR. McINERNEY: That, of course, is Mr. Stone's paraphrase. It is not the witness' words. I am not sure it is a fair question.

JUDGE HINKES: I think the witness understands what is being referred to.

Do you remember the language that you used, Mr. Smith, in that connection?

THE WITNESS: Yes.

JUDGE HINKES: What did you mean by that language?

THE WITNESS: First of all, the arrangement that is made has to be legal, and the arrangement for private label constitutes usually giving up some of the services that we customarily receive from the dairy companies and giving up an advertised brand label which has acceptance in the market, and it should have sufficient savings to overcome the additional expenses that the Company will incur in changing to private label.

By Mr. Stone:

Q In other words, was price an important consideration?

A The price was important in relationship to the other terms of the arrangement. If we were giving up a lot of services which cost money, we would have to have enough savings reflected in the quotation to pay for A & P's cost of shouldering those same expenses, so yes, price was an important factor.

It had to be sufficiently attractive to make it worthwhile so it would not be a losing proposition.

Q You mentioned a moment ago that you gave up the value of an advertised brand?

A Yes.

Q And I take it from your answer, that A & P would expect a price savings as a result of this as well?

A Whatever the advertising and promotional charges that the dairy has charged against his brand, you would expect him to not charge that against the private label brand that follows.

Q Returning to your duties as Headquarters Buyer, you mentioned taht you bought milk and dairy products in the New York market?

A Yes, sir.

Q How long had you been doing this?

A I started buying dairy products in 1962.

Q In New York?

A Yes, sir.

Q And at that time, did you also supervise purchasing activities in other areas of the country?

A From 1962 to 1964, there was another dairy buyer that preceded me. He was still there, and he was in charge of dairy products from 1962 to 1964 and the responsibility was his in those two years. Starting in 1964, to 1970, it was my responsibility.

Q You are now speaking of national purchases?

A National, yes, sir.

Q I believe there came a time when A & P initiated a private label brand in the New York area?

A Yes, sir.

Q When was that?

A It started in November, 1964, in the New York area in the New York side of the Metropolitan area.

Q AndAnd was this a project of your office?

A Yes, sir.

Q In 1964, after you had taken over the national purchasing of milk, did you suggest to anyone else that they explore private label?

A Yes, I did.

Q How did you do that?

A In late 1964, there was a meeting at Headquarters of the seven Purchasing Directors. They were the seven Divisional Purchasing Directors.

Q For dairy products?

A They were the Purchasing Directors of the Divisions. Do you understand?

Q Yes. A They were brought to New York, not for this purpose, but for a meeting of Purchasing Directors and this just accidentally coincided with the introduction of A & P brand milk in the New York market. While they were in New York, this project was shown to them.

They were made familiar with the fact that A & P had changed to private label milk in New York, and the figures pertained to it were shown to them and they were told that should go back and talk to their Unit Buyers, the 32 peopl under their various jurisdictions, and look into private l in each area to see whether or not it would be to the Comp advantage to consider it.

Q Subsequently, did they do so?

A Yes, sir.

Q Who was the Purchasing Director in Chicago?

A That was Ira Bartels.

Q And Mr. Bartels was informed of and made familiar wit A & P private label program in New York?

A Yes, sir.

JUDGE HINKES: Let me understand. You say that Bartels was the Purchasing Director for the Chicago ---

THE WITNESS: For the Middle Western Division, y sir.

MR. McINERNEY: Which is ~~well indicated~~ situated in Chica Your Honor.

JUDGE HINKES: Yes.

It was your instruction to him to talk to the Ch Unit Buyer about it?

THE WITNESS: And St. Louis and Kansas City and

Milwaukee. The people under his jurisdiction, yes, sir.

JUDGE HIFEES: And Mr. Schmidt would be such a person?

THE WITNESS: That is right.

By Mr. Stone:

Q In the following two years, did the greater part of the A & P chain commence private label milk programs?

A There were many of them.

Q Might it be said that this meeting bore fruit?

A Yes, that is a fair inference, I guess.

Q And might it be said that the Chicago Inquiry was part of a nationwide inquiry of the A & P Company?

A Yes, sir.

Q And during the subsequent two years, can you name a few of the major cities in which A & P did commence private label milk programs?

A It is a little hard to collect my thoughts on that in relation to the dates that they occurred. I can tell you some of the Divisions that subsequently got into private label but I am not too sure just what you have in mind as to the chronological order.

Q I wasn't particularly interested in the chronological order. I wanted to find out if a number of Purchasing Directors had, in turning back to their people, and commenced private label programs as a result of their inquiry.

A Up in the New England area, Boston went into private label and so did Springfield.

Q Did Cleveland?

A Cleveland went into private label; Columbus, Louisville.

Q Dallas?

A Dallas was already in private label. Did I say Louisville?

Q Yes.

A Richmond went into private label, perhaps at a later date; Baltimore, I believe. Does that answer your question, sir?

Q Yes. Indianapolis?

A Yes, they did.

Q Did you mention Detroit?

A No, Detroit was a little difficult proposition. Risdon Dairy was our dairy in Detroit, and our people changed that brand to one of our Company brands, feeling that our Company brand would be more acceptable than the Risdon label and I don't believe that comes under the same general caption as the discussion we are having about these others.

It was the same dairy, same product, but a different name on the carton, you understand.

Q Yes, sir. What about the District of Columbia?

A That would be part of the Baltimore Division. They did get private label milk some place along the line there.

Q Did all of these private label proposals come across your desk?

A Yes, sir.

Q And you gave final approval to all of these private label proposals?

A Yes, sir.

Q Might it be fair to say that during the period 1965, you were quite knowledgeable, or becoming quite knowledgeable about private label milk?

A That is conceivable, yes.

Q Was the Borden Company a major factor in this private label arrangement?

A Borden was one of our big suppliers, yes, sir.

Q And did you have rather close contact with Borden's New York office?

A Yes, I did.

Q And who was your primary contact at that office?

A The man at the highest level that contacted me was Mr. Harry Archer. He was the President of the Milk and Ice Cream Division of the Borden Company, and he had charge of the milk and ice cream business throughout the United States, and so he was the man who contacted me principally for the areas outside of the New York Metropolitan area.

The people that contacted me in the New York Metropolitan area were often local people who were in the City and operated the dairy in that City.

Q Did you deal with Mr. Archer in connection with the introduction of private label milk in the New York area?

A Yes, sir.

Q And in the cities which you mentioned, which also had Borden label milk at one point or another, did you deal with him in connection with A & P's purchases of private label or Borden label milk in those cities?

MR. McINERNEY: That is a very broad question, if I may, Your Honor. I think he has mentioned almost a dozen cities and it may be difficult for the witness to answer with respect to that.

MR. STONE: I will rephrase the question.

By Mr. Stone:

Q Did you deal with Mr. Archer on matters of concern to the Borden Company and the A & P Company throughout the United States?

MR. WHITE: I object to the form of that question, Your Honor. Matters of concern, I don't know what he means by that.

JUDGE HINKES: I think you can be a little more specific, Mr. Stone.

By Mr. Stone:

Q Did you deal with Mr. Archer when A & P decided to go into private label milk in Dallas?

A No, that kind of a negotiation is handled in Dallas. That would be, as we previously talked, that would be handled by the local people in Dallas at the Unit level. They would then turn, send their recommendations to their Purchasing Director in the Southern Division and the Purchasing Director in the Southern Division would send it to me for my approval.

Q On what sort of things did you deal with Mr. Archer?

A If he had something to offer in his Company that he felt I should know about, he would discuss it with me. For example, he didn't have any milk business in Virginia and he came in to discuss that with me.

JUDGE HINKES: Who is the "he" now?

THE WITNESS: Mr. Archer, the President of the Dairy Division, and while I wasn't responsible for the purchasing of milk, in the various unit levels, there were times when he thought that his company could get more business if somehow he could bring it about, so he came in to see me about the Virginia business on one occasion, and he did, in fact, get some business for the Borden Company in Virginia as a result of that call.

JUDGE HINKES: When a Unit of A & P negotiated a private label arrangement with a dairy in that Unit and sent it up to you, did you then have any dealings with Mr. Archer in connection with the approval of that deal?

THE WITNESS: I think, sir, about the only thing that would be involved in that kind of a situation would be if the letter of availability were missing, but as far as the figures are concerned, the offer is concerned, the answer would be no.

By Mr. Stone:

Q Did you consult with Mr. Archer at the initial stages of your consideration of private label milk in various areas of the country?

A No, those originated out in the Divisions. They did not originate in New York at all.

Q In connection with the Chicago Units' exploration of private milk, did you consult with Mr. Archer at about the time of this meeting that you mentioned a few minutes ago?

MR. McINERNEY: Would you identify the year or the date, please?

MR. STONE: Let me rephrase the question.

By Mr. Stone:

Q In the latter part of 1964, did you consult with Mr. Archer concerning private label milk for Chicago?

A I think it was the other way around. Mr. Archer consulted with me. He told me that he understood that the Chicago Division had contacted the Borden people in Chicago regarding private label milk and that he wanted to talk to me about it, and that was the occasion for his call, yes, sir.

Q Did you then consult with him?

A Yes. Yes, he wanted to tell me that he thought that the Chicago people, as he knew them, would probably be slow to react to a request for private label. He thought they would probably drag their feet and he thought perhaps we should know about that, and as a matter of fact, maybe he could negotiate a private label arrangement in Chicago with me as he had done in New York.

Q And in 1964, did he give you any figures?

A No, he said he would like to, he thought we could negotiate but that never did take place.

Q And how frequently did you see Mr. Archer at this time concerning this Chicago proposal?

A I have no way to know.

MR. STONE: Your Honor, I would note that the witness has been on the stand for about an hour and I would suggest we take a short recess.

JUDGE HINKES: Very well.

We will be in recess for five minutes.

(A brief recess was taken.)

JUDGE HINKES: You may continue, Mr. Stone.

By Mr. Stone:

Q Mr. Smith, I hand you what appears to be a memorandum of a telephone conversation dated 2/5/65 and marked for identification CX-11. Would you please familiarize yourself with the memorandum? Does this refresh your recollection as to any of the circumstances of your communications to the Chicago Division on or about February 5, 1965?

A I called Chicago early in 1965 to discuss the milk business with them, and after Mr. Archer had said something to me that maybe we could put the Chicago private label milk thing together in New York since the Chicago people would be slow to act and would probably drag their feet.

He would suggest putting it together in New York, but in February, Mr. Archer didn't make any overtures to me about the private label milk other than his original conversation. So I called Mr. Bartels in Chicago and suggested to him that if he wanted to get private label milk in Chicago, he should solicit bids from the qualified suppliers in Chicago and after he had received them, to make some recommendations as he chooses and send those recommendation into me for approval.

Q Had you spoken to Mr. Bartels regarding the proposal for private label,previous to this time, other than your original meeting?

A There were no proposals for private label at this time.

Q What I meant by proposal was the proposal of the A & P New York office that Chicago look into private label milk. Had you discussed this proposal of your own with Mr. Bartels subsequent to the late 1964 New York meeting, and prior to this telephone conversation?

A There was no proposal made.

Q Had you discussed your suggestion that he inquire concerning private label milk during the period late 1964 through February 5?

A Not to my recollection.

JUDGE HINKES: This was after you had had your meeting with the Division Buyers about private label activities?

THE WITNESS: Yes, sir. That happened in about November.

JUDGE HINKES: of 1964?

THE WITNESS: As nearly as I can get the date together, it was about November, about the same time that I went into private label milk in New York. So this, in my best estimate, would be about three months after that.

JUDGE HINKES: Let's see if I have that chronology straight. You met with your Division Buyers about private label activities in or around November 1964?

THE WITNESS: That is correct.

JUDGE HINKES: After that, Archer consulted you about the Chicago private label work?

THE WITNESS: Yes, that is right.

JUDGE HINKES: And after that, you call Bartels and asked him to check out some bids for private label milk?

THE WITNESS: Yes, sir.

JUDGE HINKES: To solicit bids?

THE WITNESS: Yes, sir.

By Mr. Stone:

Q Mr. Smith, what happened next at your level?

A In connection with ---

Q The private label negotiations in Chicago.

A Nothing happened until August.

Q During this period between February and August, did Mr. Bartels ever request, or did you ever offer him any information concerning Borden's comparison or concerning Borden's offer in New York for comparative purposes?

A I don't believe I had any dealings with Bartels about private label milk from February to August.

Q What happened in August, then?

A In August, Mr. Bartels called me and said he had a private label offer from the Borden Company and described it to me on the telephone, indicated that it had an alleged saving of $310,000 over the prices that he presently was paying for milk, and he told me that it was his opinion that the offer was not a satisfactory offer.

For example, it didn't seem to justify us giving up the Borden brand label and taking on the cost of performing the services that were being eliminated, and it didn't give us the return privileges that we were enjoying on the Borden brand, return products to them.

Also, we didn't have any protection in case of a price war. If a price war broke out and we had to meet competitive retails for some period of time, that would be at our expense instead of Borden's expense. It didn't seem like the offer was sufficiently attractive to justify going into private label.

Q Did you ask Mr. Bartels to send you any information?

A No.

Q Dis you suggest that Mr. Bartels do anything?

A Yes, I suggested again that he solicit offers from other qualified dairies, and he said he would do it.

Q Mr. Smith, I hand you Commission Exhibit for identification 34, which has been marked for identification, and ask you to review this document, if you would please.

Have you reviewed the document?

A Yes, sir.

Q Does this document refresh your recollection as to any request by Mr. Bartels, or any offer by you, to supply him with Borden's New York bid?

MR. McINERNEY: Your Honor, I don't think there has been any need expressed to have his recollection refreshed on that, but the question has been put and I don't want to impede the examination.

JUDGE HINKES: Quite right. I don't think the witness said anything about not remembering, but I think you can ask him about that question once again, if you wish.

THE WITNESS: In my previous answer, I told you that I did talk to Mr. Bartels in August, and this is August, and I presume that this is some kind of a notation that resulted from our telephone conversation, yes, sir.

By Mr. Shore:

Q My question was, though, did you, at any time during the negotiations in Chicago, send Mr. Bartels the Borden New York information for his information?

MR. McINERNEY: In other words, Mr. Stone, starting back in 1964 and going through 1965, is that correct?

MR. STONE: Until this period.

THE WITNESS: Mr. Stone, I believe that when Mr. Bartels was in New York in late 1964, I believe he asked me for the New York quotation so he would be able to remember what he had seen. I seem to remember his asking me for that.

By Mr. Stone:

Q And did you give it to him?

A Yes, I would have given it to him, I believe.

Q In this telephone conversation, did you ask Mr. Bartels for any comparative information?

A Are you speaking of this August 11 telephone conversation here?

Q Yes.

A Mr. Bartels called me to tell me that he had a quotation from the Borden Company and he discussed it with me along the lines that it was not a very attractive offer, and I suggested to him that he get offers from other concerns, and this note says "Bowman, ~~Wagner~~ Wanzer, Aurora, Joliet, Rockford."

Obviously, somebody has written down something from our telephone conversation. Yes, I did ask him to get quotes from qualified suppliers.

Q Did you also ask him to send you any comparative information at that time, or any information at all at that time? For instance, did you ask him to send you any information comparing the Borden price for Borden label milk and the Borden proposal?

A As of August?

Q As of August 11.

A No.

Q Did you ask him to send you any comparative cost information at that time?

A No.

Q Mr. Smith, I hand you Commission Exhibit for identification 23-A through I, and I believe this has been received in evidence. Would you please familiarize yourself with this document?

Have you ever seen this document before, sir?

A I don't believe I have seen this document until very recently. I have no recollection of having seen this document back at the time that it pertains to.

Q Thank you. Mr. Smith, I hand you Commission Exhibit for identification CX-48-D through F, which document appears to be a blank bid form.

Have you reviewed the document?

A Yes, sir.

Q Have you ever seen this document before, sir?

A No, sir.

Q After this August 11 phone call, what was the next word you had concerning the Chicago negotiations?

A The next call I got was in September, 1965, when Mr. Bartels called me and said he had just received a quotation o his milk business from the Bowman Dairy Company, and he said that the savings, the prices, the savings that were indicate in this new offer were much more attractive and he was rathe happy about it.

Q And did he send you the Bowman Dairy bid?

A I instructed Mr. Bartels to send me the Bowman bid with his recommendations and also that this looked like the one t we are probably going to go with, so since some time has to elapse in getting rid of your old milk Supplier -- sometimes takes 30 days or 60 days notice to tell the Supplier that we are going to make a change so he has time to get his house i order, and so forth -- that this would be a good time for hi to notify the Borden Company that they had lost the milk bus ness and that this new offer that he had just received, send to New York for approval, and he said he would do it.

Q Is that what he did?

A No, not at that time.

Q What did he do?

A About a month later, he sent the Bowman bid into me, bu he also sent in with it a new revised Borden bid, a re-bid, this showed that the Borden bid had been changed from its previous level to now, to a point where it seemed to be more attractive on the face of it than the Bowman bid, and he wrote me and said that he recommended, he and these people out there, recommended that we accept the Borden bid rather than the Bowman bid.

Q Anad what did you do at that point?

A Of course, I was surprised to see a Borden re-bid because this is not the customary way for a Buyer to operate, but nontheless, the offer did seem like it saved more money. His recommendation was that he and his President and his Sales Director agreed that this was the one they wanted to go with and ---

JUDGE HINKES: Mr. Smith, you say that you were surprised at the new bid? - - -

THE WITNESS: Yes, sir.

JUDGE HINKES: --- by Borden, and I think your language was because that was not the way a Buyer acted; and A & P is the Buyer, isn't it?

THE WITNESS: Yes.

JUDGE HINKES: What was the way that A & P acted that was different?

THE WITNESS: The Borden Company had already bid in August and had made -- in other words, he asked all the dairies for bids. Borden came in in August with theirs, and we discussed that it was not a very satisfactory offer. Then subsequently, the Bowman offer came in which was a more attractive offer.

The customary way would be to accept the Bowman bid as our new milk Supplier. He had a better proposition than Borden, but somehow in giving the Borden Company notice of our change of suppliers, apparently they were allowed to make a re-bid.

JUDGE HINKES: In other words, you were surprised that Bartels had received, or had solicited as the case may be, a new and better bid from Borden?

THE WITNESS: Yes, my instructions to Mr. Bartels were simply to tell them that we had a better -- that we had a new milk Supplier and that we would like to have an estimate of the date when the new Supplier could take over the operation, but instead of taht, somebody prevailed on somebody else to accept a new offer.

By Mr. Stone:

Q And, sir, what did you do at this point? Did you recommend approval? Did you okay it?

A It seemed to have all of the qualities that were required of a milk offer. The recommendation of the people out there was something that you had to consider. Mr. Vogel was an officer of the Company and these were his Purchasing and Sales Directors who recommended it. The offer was quite evidently cost-justified.

MR. STONE: Your Honor, I ask that the answer be

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stricken as a legal conclusion.

MR. McINERNEY: I object, Your Honor. He asked the witness what he was doing next and what he thought of, and I think it is a proper answer.

JUDGE HINKES: I am going to deny the ~~question~~ objection, but let me ask you, Mr. Smith, you say that the bid was apparently or obviously cost justified. You mean as far as Borden was concerned?

THE WITNESS: Yes, sir.

JUDGE HINKES: How do you know that?

THE WITNESS: The Bowman bid that accompanied it was in pretty good detail. They started with the raw milk price and added their various cost factors and arrived at the end cost to A & P, and the Bowman cost and the ~~A & P~~ Borden cost were almost the same.

As a matter of fact, the quart milk from Bowman was cheaper than the quart milk from Borden and they had added into their cost a factor of profit.

JUDGE HINKES: Let me understand. When Mr. Bartels submitted this new bid, did he also submit a cost statement from Borden?

THE WITNESS: No, he didn't have a cost statement from Borden, sir, but he had with it a quote from the Bowman Company and the Bowman Company bid was a lower bid than the Borden bid, and it was cost justified.

JUDGE HINKES: How did you know that the Bowman bid was cost justified?

THE WITNESS: Because they had added a profit factor into their cost to show that they were covering their cost and a profit.

JUDGE HINKES: They submitted a cost statement, Bowman did?

THE WITNESS: It was in quite detail, yes, sir.

JUDGE HINKES: And you assumed that Borden's figures, to the extent that they corresponded with Bowmans figures, were therefore also cost justified?

THE WITNESS: Yes, sir.

JUDGE HINKES: Very well, you may continue, Mr. Stone.

By Mr. Stone:

Q Let me ask the previous question again. Did you approve the bid?

A I sent it to the Legal Department for their approval and they did approve it, and I approved it, yes, sir.

Q And was this approval necessary before service could start?

A Yes, sir.

Q Mr. Smith, I show you Commission Exhibit already received in evidence, 52, with various subparts, and ask you, sir, if this is the Borden bid which you received?

MR. McINERNEY: Your Honor, I believe that what Commission Counsel has handed the witness is not the entire document that he received, and I would ask that the entire document that he received be shown to him.

MR. STONE: Sir, may I ask Borden Counsel what is the entire document?

MR. McINERNEY: I can give you a copy of it. I believe you have all of it, but what has happened is that the Commission's numbers for identification are not in sequence. In other words, I can shorten this by handing Counsel documents which he has already seen, which put together the entire thing that, I believe, is the complete document.

MR. STONE: Thank you.

MR. McINERNEY: I don't believe any of those pieces of paper that I have just handed over are new to Counsel. They were all marked for identification by Commission Counsel previously.

MR. STONE: Rather than complying with Mr. McInerney's suggestion, I would like to hand the witness Commission Exhibit for identification 50 with various subparts, and Commission Exhibit for identification 67.

By Mr. Stone:

Q When you have finished reviewing them, Mr. Smith, will you please tell us if these three documents are the documents you received?

A Some parts of this, I feel sure, are some of the documents I received, but there are pages in here which I have not seen before and which were not part of the document that was sent to me.

Q Did you receive Commission Exhibit 67?

A Yes, sir.

JUDGE HINKES: 67?

THE WITNESS: That is this covering letter, sir.

MR. McINERNEY: My offer was to expedite this by giving Counsel what went along with Commission Exhibit 67, because there is some confusion with respect ot the way these have been numbered previously.

MR. MATHIAS: Off the record.

JUDGE HINKES: Discussion off the record.

(Discussion off the record.)

JUDGE HINKES: On the record.

MR. STONE: Would you mark this as CX-263 for identification?

EXH

(The document referred to was marked Commission Exhibit CX-263 for identification.)

MR. STONE: Commission Exhibit 263 appears to be a letter of The Great Atlantic and Pacific Tea Company and various schedules attached.

By Mr. Stone:

Q Mr. Smith, handing you Commission Exhibit for identification

263, can you refresh your recollection from that document and tell us what portions of the Borden Company bid, Commission Exhibit CX-62, were sent to you? What portions of CX-62 were included in the package which you received?

MR. McINERNEY: I wonder, may we have the witness identify that document? Then I think we will know what part he did and what part he didn't receive.

JUDGE HINKES: Yes, tell us what Commission 263, which you are holding in your hand now, is.

THE WITNESS: This is the document that Mr. Bartels sent to me asking for approval to put private label milk supplied by the Borden Company in Chicago.

JUDGE HINKES: The first page is a covering letter, is that correct?

THE WITNESS: That is right.

JUDGE HINKES: And what follows that covering letter in that same exhibit?

THE WITNESS: The attachment is a comparison of the prepaying price on an annual basis for Borden label milk as it supposedly was at that time. The next column is a calculated cost of this same amount of milk under the A & P label from the Bowman Company.

The next column is the calculated cost of the same amount of milk bought from Borden under the A & P label. And the final column is a subtraction of the Borden private label quotation on an annual basis from the current paying price.

MR. STONE: Your Honor, perhaps now that the witness has identified this page, we could take a brief recess right now so that Commission Counsel may review this document which we have not seen in this form before and decide whether we wish to intoruduce this in evidence or introduce the documents as they have been supplied to us.

JUDGE HINKES: We can take the recess now if you wish, or perhaps you would like to continue until we break normally for our lunch recess. It is up to you.

MR. McINERNEY: I don't think there is anything new in what we have supplied.

MR. WHITE: We would like to read it. We have never seen it.

JUDGE HINKES: Can you go on to something else in the meantime, or is this the necessary item for chronological sequence?

MR. STONE: I think that it would be best to permit us to take a brief recess. This is the logical progression to discuss this.

JUDGE HINKES: I think to give Mr. White an opportunity to look at it as well, we had better recess for lunch at this time and we will pick up again at 1:15 p.m. if that is agreeable.

MR. [illegible]: That will be fine.

JUDGE HINKES: Very well, we will recess at this time and resume in this room at 1:15 p.m.

(Whereupon at 11:45 a.m. the hearing recessed to reconvene at 1:15 p.m. the same day.)

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AFTERNOON SESSION

1:20 p.m.

JUDGE HINKES: The hearing will be in order.

I believe we had some little confusion about a proposed exhibit here.

MR. STONE: Yes, Your Honor. We were handed just before the noon recess a document which we have marked as Commission Exhibit 263-A through Z-15 for identification and which consists of a letter on the Grett Atlantic & Pacific Tea Company, Inc., letterhead dated October 1, 1965, and signed apparently by I. R. Bartels, together with a number of schedules attached.

HERSCHEL SMITH resumed the witness stand and testified further as follows:

DIRECT EXAMINATION - cont'd

By Mr. Stone:

Q Mr. Smith, I hand you the document which you reviewed before the lunch hour. First of all, is this the bid package which you received in New York?

A This is the letter that Mr. Bartels sent to me requesting approval.

Q And is it signed by Mr. Bartels?

A Yes, sir.

Q And noting that in the last paragraph of the letter there appear a few inked notations in blue ink, can you identify that handwriting? Is it your handwriting?

A It is not my handwriting, but above Mr. Vogel's name it appears that somebody has written that he is the director of sales.

MT. STONE: Offer CX-263-A through Z-15 with the exception of the handwritten notations.

JUDGE HINKES: Is there objection?

MR. McINERNEY: No objection, Your Honor.

JUDGE HINKES: Mr. White?

MR. WHITE: Nothing special, Your Honor.

JUDGE HINKES: 263 with the subletttering is received as offered.

(The document referred to, heretofore marked for identification Commission's Exhibit CX-263-A through Z-15, was received in evidence.)

MR. MATHIAS: Your Honor, I might note for the record that Complaint Counsel had not seen this document before and have not had time to prepare copies and copies will have to be made and supplied to Your Honor and to the other parties.

MR. McINERNEY: I would like to note, if I may, Your Honor, just to tie this into the proposed exhibits, the covering letter is a copy of the original, the file copy of which has been marked as CX-67 for identification. The comparison next to it has been marked as Commission Exhibit 65 for identification. The Borden quotation accompanying the letter has been marked Commission Exhibit 62 for identification. The Bowman quotation accompanying the letter has been marked Commission Exhibit 50 for identification, and the Borden letter accompanying the cover letter from Mr. Bartels has been marked Commission Exhibit 68 for identification and Respondent's Exhibit 2 in evidence.

MR. MATHIAS: Your Honor, I would like to note in that regard that neither CX-50 nor 62 which has been marked for identification and -- Well, as a matter of fact, CX-62 is in evidence -- are contained in the entirety as attachments to this letter.

JUDGE HINKES: Well, in any event, I don't know what the dispute is about. Is that --

MR. MATHIAS: There is no real dispute.

MR. McINERNEY: No. It is simply tying in other documents that have been marked, Your Honor. That is all.

JUDGE HINKES: Very well.

By Mr. Stone:

Q I believe you noted before the lunch hour, Mr. Smith, that after receiving the package which has been marked as CX-263 with various subparts, and after taking various steps, you granted the necessary approval to commence service.

A Yes, sir.

Q Did you communicate your approval to the Chicago office?

A Yes, I did.

Q I hand you Commission Exhibit 74 for identification and ask you, sir, if that is the memorandum which you sent to the Chicago office sometime thereafter.

A Yes, sir.

MR. STONE: Offer Commission Exhibit 74 for identification into evidence.

JUDGE HINKES: Is there any objection?

MR. McINERNEY: No, Your Honor.

JUDGE HINKES: 74 is therefore received.

(The package referred to, heretofore marked for identification Commission's Exhibit CX-74, was received in evidence.)

By Mr. Stone:

Q Mr. Smith, in late May or early June 1966, after the private label arrangement had commenced, did you attend a meeting in New York at which time Mr. Pentz or Mr. ARcher discussed a proposed price increase on private label in the Chicago area due to increased Borden costs?

A I don't believe Borden ever discussed any Chicago price increases with me. I have no recollection of any such meeting.

Q Mr. Smith, do you recall at this time, namely, late May or early June 1966, discussing with Mr. Archer or Mr. Pentz any legal problems relating to the Chicago area and to A & P and Borden in that area?

A No, sir.

Q Mr. Smith, I hand you Commission Exhibit CX-81 for identification, and ask you to familiarize yourself with this handwritten notation. I particularly direct your attention to the last two paragraphs of CX-81. Does this refresh your recollection as to any discussion you may have with either Mr. Archer or Mr. Pentz as to any Chicago legal problems?

MR. McINERNEY: In May of 1966?

MR. STONE: Yes, or June.

THE WITNESS: No, it does not.

By Mr. Stone:

Q Does it refresh your recollection as to any discussion of cost increases?

A I recall a telephone call from Mr. Bartels and I can assume it was about this time. He did call me at one time asking for guidance as to how do you deal with a supplier at arm's length when he comes in for a cost increase to determin whether or not what he is asking for is in fact justified. A I discussed on the telephone with Mr. Bartels that general subject of the way this can be done, or the way that I custom arily do it.

Q Do you recall any conversations with Mr. Pentz or Mr. Archer?

A They have been in to talk to me about New York price changes. But I don't recall their ever talking to me about price changes outside of New York.

Q Now, Mr. Smith, do you recall whether A & P's volume of sales of milk and dairy products in the Chicago area at this time, meaning 1965 and 1966, was increasing or decreasing?

A I would not know that. I do not know that.

Q Mr. Smith, can you tell us A & P's general method of supplying its stores with products for sale?

MR. McINERNEY: Could you be a little more specific than that.

By Mr. Stone:

Q Does A & P make or package some products sold through its stores itself?

A Yes, it does.

Q I believe you mentioned that ~~the~~ it manufactures or produces evaporated milk.

A Yes, sir.

Q Does ~~the manufacturer or packager~~ it manufacture or produce coffee?

A It roasts and packages coffee.

Q Under its own label?

A Under its own label, yes, sir.

Q What other products, as examples?

A Well, there are many of them. I can give you some examples. They manufacture a line of canned beans and associated products. Macaroni products. Preserves, jellies, jams, peanut butter, salad dressing, mayonnaise. Some dog foods, mustard, some catsup, and nut meats, frozen french-fried potatoes, a whole line of bakery products, potato chips.

Q Was this during the period 1965?

A Yes, sir.

Q Soap?

A I believe the answer was no at that time. At a subsequent date they went into soap but I don't think they made any soap at that time.

Q How are these products distributed from the plant to the Chicago unit?

MR. McINERNEY: Your Honor, I think we are getting pretty far afield here on the distribution of soap and other products.

JUDGE HINKES: What is the relation, Mr. Stone?

MR. STONE: I think, Your Honor, we want to show the distribution network of the Great Atlantic & Pacific Tea Company. They have denied that they are in interstate commerce and they have denied that the operations of their Chicago unit are in interstate commerce in particular. I believe that the showing that the Great Atlantic & Pacific Tea Company manufactures a great variety of products; that it buys national brands from numerous producers of the same; that it maintains warehouses throughout the country; that it ships its own products to these warehouses; it central warehouses these products and ships them to its own stores, and that it purchases other products at the local level, will establish that A & P is in interstate commerce.

In addition, I would like to point out that the real difficulty in this case will reast in part on the nature of the operations of the Great Atlantic & Pacific Tea Company.

Mr. Smith has testified that the private label program initiated in Chicago was part of a nation-wide inquiry. I would like to show the integrated nature of the operations of the A & P Company.

MR. McINERNEY: Your Honor, we have never denied, as far as I am aware, that A & P is in interstate commerce and I don't think that is an issue in this case at all. There may be an issue whether certain sales of milk were in interstate commerce but it has nothing to do with sales of soap or any other product, and if we haven't admitted it heretofore, I will now admit that A & P in certain aspects of its business is in interstate commerce. I think it is irrelevant.

MR. STONE: Might I ask if you will admit that the operation of the Chicago unit and the stores thereof are operations in interstate commerce?

MR. McINERNEY: No. We went through this, I think, in your request for admissions, and particularly with respect to the stores of the Chicago unit. I think those are localized operations. But that has nothing to do with the question to which I have taken objection, Your Honor.

JUDGE HENKES: I don't quite see what you are driving at, Mr. Stone. It seems to me that your question which has to do with the national operations of A & P is not going to indicate the right answer to the Chicago area stores business.

MR. STONE: I believe, Your Honor, that my question was to the effect that -- Well, first, we had established that A&P had manufactured a number of products itself. My next question, and the question which was objected to, was how were these products distributed to the stores of the Chicago unit. That is really all I want to show, is that the Chicago unit received a great varity of goods in interstate commerce, and many of its sales were in interstate commerce.

JUDGE HINKES: If you are going to limit your question then to the distribution to the Chicago stores, that I do think will be pertinent as long as A & P continues to deny interstate commerce as being involved in the Chicago stores.

MR. McINERNEY: Your Honor, I won't restate our position at any length. I think there were certain interstate commerce aspects of the Chicago Division and the Chicago unit. I think if Mr. Stone were inquiring about whether A&P had its own milk plants in 1965 as it had its own soap operation, that might be relevent, but I just don't see the relevancy of the dog food and all these other things that he is talking about here.

JUDGE HINKES Well, the issue, as I see it, is whether the A & P stores in the Chicago area were engaged in interstate commerce, and if I understood your statement, Mr. McInerney, you admit that they were so engaged.

MR. McINERNEY: The A & P stores, no, sir, Your Honor. I think what we admit is that the Middle-Western Division or the Chicago unit at certain aspects of their opeartions were in interstate commerce. As to particular A & P stores. I am not sure what the evidence is with respect to that, and I don't think that has been admitted as yet.

JUDGE HINKES: Well then, I think we will have to go into that issue. That is the point that is being raised now, just what function these stores perform in connection with its acquisition of certain products and their interstate character.

MR. McInerney: Well, my objection, Your Honor, is what is relevant is whether there was some interstate characteristic in the milk operation and not to the dog food --

JUDGE HINKES: Well, that may not be necessarily proven. I don't think it will matter, as a matter of fact, though, if the store sales are engaged at least to some extent, to a material extent, in interstate commerce then I think that we are in the ballpark.

MR. McINERNEY: Your Honor, it seems to me it is Commission Counsel's burden to show that if there was any discrimination in price that the discrimination of which Commission Counsel complains was in interstate commerce, and that has nothing to do with any product other than milk and daily products.

JUDGE HINKES: I am not quite sure that I agree with you on that. I will have to allow the evidence to come in and consider this further. You may continue.

MR. STONE: If you can, would you read the question?

(The question was read as follows: "How are those products distributed from the plant to the Chicago unit?")

MR. McINERNEY: Can you identify what the products were?

MR. STONE: I believe that the previous line of questions had indicated that the products were those manufactured or packaged by the Great Atlantic & Pacific Tea Company itself.

MR. McINERNEY: Well, if the witness after all this colloquy has in mind the products mentioned, I have no objection.

JUDGE HINKES: Can you answer that?

THE WITNESS: Yes. Generally, those products are manufactured at one or more plant locations and are shipped to the unit warehouse and from the unit warehouse the store draws his requirements.

By Mr. Stone:

Q Do you know where the warehouses serving the Chicago unit were located in general terms?

A Well, my knowledge of it is there is one warehouse on the North Side of Chicago at Pulaski Road. To the best of my knowledge, there is still a warehouse on Pershing Road on the South Side of Chicago. There is a meat warehouse, a butter warehouse, a produce warehouse, and a bakery, and I believe that is all that I am aware of.

Q You mentioned a number of warehouses. Were the products transshipped or shipped from the warehouse then to all of the stores of the Chicago unit?

A Yes, I am quite sure that would be so.

MR. McINERNEY: We are still speaking about non-dairy products, I believe, Mr. Stone.

MR. STONE: I believe we are speaking about all the products which the witness mentioned.

MR. McINERNEY: Non-dairy.

MR. STONE: If butter is non-dairy.

MR. McINERNEY: I didn't hear butter.

THE WITNESS: Yes. I mentioned gutter. Yes. We have a butter warehouse and a meat warehouse. I presume thatall of the stores that sell meat would draw from meat supppies from the meat warehouse as far as I know.

MR. STONE: Thank you.

By Mr. Stone:

Q As to the A&P brand products which you mentioned, do all A&P stores handle these products, if you know?

A The truth is that each store orders and sells the products that he thinks will sell in his store, or that he has room to handle in his store. He has those two limitations, and so when you say does he sell them all, there are some smaller stores that can not and do not handle them all. So there is not an absolute uniformity, if that is your question.

Q Would all A&P stores sell the basic products under an A&P label which you have mentioned such as, for instance, butter?

A That is very likely so. Conversely, all of them have these available to them to sell. I can tell you that specifically.

Q Now, again, if you know, can you tell meif the Great Atlantic & Pacific Tea Company also purchased a number of lines of products on a national basis? Did it purchase, for instance, cereal from national manufacturers of cereals?

A Yes, sir.

Q And were these products distributed to the A&P warehouses in the same manner?

A It wouldn't be in the same manner because there are many of those products that are made by various manufacturers and these sources vary greatly, and it would be, I don't think it would be correct to just make one blanket statement that they all did any one thing. Generally, you ship those products to the divisions that order them, in the most advantageous way, and that is searched out in each case and that would be the system that they would use.

Q I see.

JUDGE HINKES: The warehouse gets these products, though, from all over the country, doesn't it?

THE WITNESS: Yes, sir.

By Mr. Stone:

Q Returnig for a moment to the products which A&P manufactures itself, could you give us an idea where some of these products are manfuactured?

A Yes. We mentioned dog food a while ago. That is manufactured in Brockport, New York.

Q Maybe to expedite things a little bit, could you tell us where the canned goods are manufactured?

A We have two plants, one at Terre Haute, Indiana, and one at Horsehead, New York that manufacture wide lines of A&P products. When I say wide lines, I include many of the categories that you asked me to enumerate from memory a while ago, which comes into canned beans, preserves, jellies, macaroni products, salad dressings, mayonnaise, et cetera. We have two plants that both manufacture those lines.

Q I see. And in connection with the central purchases from national manufacturers or others, would many of these products also be shipped from other States into the Chicago unit warehouses, and hence distributed?

A Yes, sir.

Q And are any products drop-shipped directly from the supplier in various States to the stores of the Chicago unit?

MR. McINERNEY: Would you specify the products that you are speaking of?

By Mr. Stone:

Q Are any products drop-shipped from the supplier to stores of the Chicago unit?

A Well, you will have to pardon me just a second while I try to collect some thoughts because there are ten thousand items involved in there and there may be one that doesn't come to my mind for the moment.

It is possible that we may get some private label beverages, soft drinks, delivered directly to our stores. I do not know specifically that Chicago does but some parts of the company do and Chicago could conceivably be one of those.

MR. McINERNEY: Your Honor, I would move to strike any speculation on the part of the witness. Any testimony about possible or conceivable has little if any probative value, I think.

JUDGE HINKES: Yes. You understand as a possibility the matter can not be received. If you think it is likely, that is another story.

THE WITNESS: I believe it would take, sir, a certain amount of research to really answer that question intelligently. There are so many products that come from far and wide. Well, I can say that there is a very limited amount of drop shipments that take place in the A&P stores. It is not unheard of. But it is a minimum part of our supply situation.

By Mr. Stone:

Q At this period in the year 1965 did A&P operate its own dairy in any part of the United States, or was it contemplating running its own dairy in any part of the United States?

MR. McINERNEY: May we have those questions separately, please.

JUDGE HINKES: Let's separe them.

By Mr. Stone:

Q Was A&P running its own dairy in any part of the United States in 1965 as far as you know?

A This is fresh milk?

Q Fresh milk and dairy products.

A No, they were not.

Q Was A&P contemplating runnings its own dairy at that time?

A A & P had plans to operate its first plant in ~~North~~ Fort Washington, Pennsylvania.

Q When was it opened?

A It was opened in 1966 and I am not too sure how far along the plans were at the time you are asking, and I believe I would have to speculate on that.

Q And do you recall what time in 1966 the plant was opened or came under A&P control?

A Not from memory, no, I don't. It was some time in 1966

Q Do you remember whether it was the early portion of the year or the later portion?

A No, I believe I would just have to guess. I had rather not.

MR. McINERNEY: Excuse me, Mr. Stone. Could I have the second to last answer read back, please.

(The reporter read from her notes as requested.)

JUDGE HINKES: Mr. Smith, do you know when the plans first originated for that particular dairy plant that was opened in 1956?

THE WITNESS: No, I can't pinpoint that, sir.

JUDGE HINKES: Even as to the year?

THE WITNESS: I think I would have to make a guess based on the probable time of building the plant which I think consumed a great part of a year, and I suppose that there --

MR. McINERNEY: I am going to object to guesses on the witness' part.

JUDGE HINKES: I don't understand that his statement that the building of the plant was a guess, was it?

MR. McINERNEY: I think he said he doesn't know when it opened.

JUDGE HINKES: I know that. He is saying that the building of the plant took the greater part of a year. Was that your language?

THE WITNESS: Yes.

JUDGE HINKES: And again presumably planning always takes place before the first building takes place.

THE WITNESS: That is right.

JUDGE HINKES: Very well, you may continue.

By Mr. Stone:

Q Now, Mr. Smith, in connection with the A&P sales of A&P label products which we were discussing a moment ago, can you tell me if A&P stocks an extensive line of A&P label products?

A Yes, sir.

Q Does A&P have private label products in most of the major grocery lines?

MR. McINERNEY: I would object unless there is some definition of what we are talking about. I personally don't know what the major grocery lines are. Perhaps Mr. Stone does and the witness does, but --

MR. STONE: Good. If the witness knows, let him answer.

MR. McINERNEY: Well, if his definition is different from yours, and mine is different from both of you, I don't think it is going to help anything.

JUDGE HINKES: Well, it would be helpful to have some agreement as to what we are talking about.

MR. STONE: It is my understanding, Hour Honor, that "grocery" has a rather specific meaning, but if Mr. McInerney does have some problem with the meaning I will rephrase the question.

JUDGE HINKES: Perhaps the witness can help us.

THE WITNESS: Well, you said grocery, so I presume from that youare eliminating meat.

MS. TONE: Yes.

THE WITNESS: And you are eliminating the produce, fresh fruits and vegetables, and you are not talking about dairy now. You are not talking about dairy?

MR. STONE: No.

JUDGE HINKES: I think you ought to explore this wit the witness, Mr. Stone, and make sure you are asking what the witness is answering, and vice versa.

THE WITNESS: Well, we have eliminated about half of the business of the store by virtue of these products which ar not involved.

JUDGE HINKES: And these products are meat, fresh fruits, vegetables and dairy, is that it?

THE WITNESS: Yes, and we have our own line of baker That is a major line.

JUDGE HINKES: But that is also eliminated from the line of groceries, is that what you are saying?

THE WITNESS: Well, I don't know what he has in mind of groceries.

MR. STONE: Your Honor, perhaps I can make my questi somewhat more specific so the confusion will be alleviated.

By Mr. Stone:

Q In connection with your canned goods sales, do A&P sales of A&P label products constitute a significant proportion of A&P's general sales of canned goods, if you know?

A Is this fruits and vegetables and juices --

Q Yes.

A --or is this canned meat or canned dog food when you say canned goods?

Q Let's talk to canned vegetables and fruits to start with.

A We have a significant line of canned fruits and canned vegetables and canned juices which are an important part of our sales of those products.

Q Now, are your sales of various of the macaroni and that general line of product, or in connection with your sales of macaroni products and staple products, are a substantial portion of your sales in that area under A&P?

MR. McINERNEY: Excuse me. I would like to point out that I think the questions and answers have now shifted to the present tense. We were talking a little while ago about 1965. If everybody understands this, it is all right, but I just wanted to somehow or other get this clarified.

MR. STONE: May I ask the witness, was your previous answer directed to 1965?

MR. McINERNEY: Which previous answer, sir?

MR. STONE: Canned goods.

THE WITNESS: I don't believe the canned goods situation has changed much between '65 and today so we can say yes, it would include 1965.

By Mr. Stone:

Q In the year 1965 did A&P label products constitute a significant proportion of your sales of macaroni and allied products?

A I don't believe I am in a position to answer that.

Q What about bakery items?

A The fresh bakery items, excluding cookies and crackers.

Q Yes.

A It would be a significant part of the bakery business.

Q And I believe that you previously testified that during the period 1965 and 1966 a large proportion of A&P stores added private label dairy products.

MR. McINERNEY: I object to that. I am not sure that that is so but why don't we let the witness tell us instead of summarizing what he says?

JUDGE HINKES: Yes, let's ask the witness.

By Mr. Stone:

Q Did a substantial portion of A&Ps stores in the period 1965 and 1966 add private label dairy products?

MR. McINERNEY: Is this a nationwide question, Mr. Stone?

MR. STONE: All of A&P stores in the nation and out the nation.

THE WITNESS: Several units of the company out of the 32 units that we operate, several of them changed from the supplier's label to private label during that period, yes.

Q And in these stores did the private label constitute a significant proportion of A&P's ales of dairy products?

MR. McINERNEY: The stores in the units where there was a change, I take it we are referring to?

MR. STONE: Yes.

THE WITNESS: Well, the results varied greatly from one area to another but basically the answer is yes.

By Mr. Stone:

Q And at this time in 1965 and 1966 did A&P pomote its own private label products as a general matter? To your knowledge.

A Well, while the promotion of goods at A&P is not part of my department, my impression of what was going on was that it was about the same as it had been. I don't think there was any increased momentum, or any decrease. It seemed like it was about the same.

Q Are you saying that there was a continuing program?

A The private label and the nationalbrands are always both offered for sale in our stores, and that was true before this period and during this period and since this period. I don't believe there was any change in momentum as far as my knowledge is concerned.

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Q At that time did A&P engage in any promotional activities regarding the own label products?

MR. McINERNEY: I'm sorry, Mr. Stone. The time again is what?

MR. STONE: 1965.

MR. McINERNEY: And the products are all products.

MR. STONE: Yes. I think I would prefer, if my questions are not particularly clear, you either object to them or that you save the clarification for cross-examination.

MR. McINERNEY: Well, I have been trying not to object.

MR. STONE: I would prefer that course.

MR. McINERNEY: Your Honor, if we can't get it clarified, I object to questions that have no particular time period referred to and no particular products referred to. I don't think that they are specific enough to elicit anything that is of any great value to this proceeding.

JUDGE HINKES. Yes. I think we will have to require specificity in the questions or else the answers are not going to be worth too much.

MR. STONE: I will rephrase the question, Your Honor.

By Mr. Stone:

Q In the year 1965 and1966 and in connectio with A&P sales of private label products, namely A&P label products or Ann Page label products or products of the line, did A&P engage in any promotional activities to promote its own label?

A As nearly as I can answer that, I believe about all the light I could throw on that was that, yes, they do promote that. You will find it in the newspaper advertisements and on the window signs and this is something that has been going on throughout my lifetime, and I don't believe that there was any change during this period you are inquiring about, so if it is that there was something new added or some change made at this point here, I don't know of any but, yes, they do promote their own products, that is right.

MR. STONE: Your Honor, perhaps we could take a short recess so that we can review our notes.

JUDGE HINKES: Very well, we will take a recess for about five minutes.

(Brief recess)

JUDGE HINKES: Mr. Stone.

By Mr. Stone:

Q Now, Mr. Smith, some time ago this morning we were speaking of the private label negotiations at issue here, and I don't believe I asked you this question: Were any of the bids which Borden submitted to A&P's Chicago Division or Chicago unit other than the final bid ever transmitted to you?

A No. Just one.

Q Just the final bid?

A The final one.

Q Then just two further questions:

Sir, how long have you been with the Great Atlantic & Pacific Tea Company?

A Since 1926.

Q And are you presently receiving any sort of pension from the Tea Company?

A Yes, I am.

MR. STONE: No further questions, Your Honor.

JUDGE HINKES: Cross examination, Mr. McInerney?

CROSS EXAMINATION

By Mr. McInerney:

Q Mr. Smith, you mentioned that in about 1964 A&P commenced a general inquiry into the possible advantages of private label milk in various parts of the country.

A Yes, sir.

Q Was there any particular occasion for that inquiry?

A Yes, there was.

Q Can you tell us what that was?

A Well, we observed that our competitors in a large way were selling private label milk.

Q Can you name some of those competitors?

A Yes. Safeway sold private label milk that they produce themselves. Kroger sold lots of private label milk, some of which they produced and some of which they bought. National Tea's Stop & Shop, Food Fair, Acme, Winn Dixie.

Q Jewel?

A Jewel.

Q Any others that you can remember offhand?

A Well, there were many others. Bohack in New York, for example, had private label milk. They are a small chain but they did have private label.

So I caused a survey to be made throughout the United States of A&P's milk buying practices and sent out an inquiry to find out what we were paying, what our competitors were doing, and got it back, and as I looked at this it was evident to me that A&P was probably paying too much for its milk, and in New York where I was located it was quite obvious to me that we were paying Borden too much for milk in New York.

Q Why do you say that?

A Well, before we went into private level milk in New York in November of 1964 they came in to me in May of 1964 with a price reduction that was about a million-dollar price reduction, and said that they wanted to lower their prices in New York so that A&P would be more competitive. Now, this price reduction was not solicited and this followed a similar action about a year previous to that in the spring of '63 in which they then also reduced their milk prices substantially. For example, I recall in 1963 they reduced the gallon price by 18 cents a gallon in the City of New York.

And I recall, too, at that time that we were paying Borden

23 cents a quart for milk in New York, and some chains, King Cullen for one, were selling milk out of store for 21 cents. And about that same time in the spring of '64 a dairy came into to visit with me, the owners of the dairy, called Glenn & Mohawk. They are located in Fultonville, New York, and they identified themselves as the supplier of private label milk in New York City to Bohack and asked if we would be interested in considering them as a supplier of private label milk for A&P. Their offer to me at that time was to supply milk at 17-1/2 cents a quart and they mentioned at that time that during the flush time of the year when the raw milk supply was flush and the prices were lowest that the milk price in New York might go down as low as 16-1/2 cents instead of 17-1/2 cents.

Some people in our company had seen a study of the Risdem Dairy plant in Detroit -- I think they were inquiring as to whether the plant should be bought. I think they were trying to sell it. They looked at their books and they were making something like 30 or 50 percent in their milk business. They were our suppliers, and we were their principal customer.

So to answer your question, yes, I was fully convinced that A&P's milk buying practices were not what they should be and that we should look into them promptly.

Q And among other places that you looked into private label I believe you have testified was in New York. Is that correct?

A That is correct.

Q And in New York with whom did you speak in the Borden Company with respect to private label? I think you have said this before but I just want to tie it in.

A Well, I spoke to Mr. Archer about thatbut also I think I contacted Mr. Brennan oftener. He was the President of the Dairy Seal operation in New York, and I believe he came in oftener and was the responsibile party largely in the City. ARfher was his superior, and so Archer oftentime sat in with Brennan and talked about New York City.

Q And ultimately I think you hae told us some time in November of 1964 Borden became the supplier of private label milk to A&P in the New York area, is that correct?

A--- In the New York, District of New York--- Metropolitan New York, that is right.

Q Now, do you recall in approximate terms at least the prices at which Borden supplied private label milk to A&P in New York? Was there a formula of some kind or how did that work?

A Well yes, there was a rule of thumb that was given to me by the dairies at that time as I was getting into the dairy business. They had some rule of thumb which was a guide as to whether or not the milk price was substantially what it should be or what it could be and it was what they called a 2-2-2 formula.

Q What does that mean?

A It means simply that roughly speaking you can take the raw milk price that the farmer gets and add 2 cents for the carton, 2 cents for the processing overhead and profit, and 2 cents for delivering it to the store and you have got an approximate cost figure based on a normal dairy's operation.

Q Now, what I had asked you previously, Mr. Smith, was what did Borden actually charge you? Did they actually charge you on the basis of the 2-2-2 formula?

A Yes, that is what it turned out to be, yes.

Q That is per quart of milk?

A Per quart of milk, that is right.

Q And how did it work out on the half gallon and gallon?

A Well, the half gallon carton was less than two quart cartons and so it was a lesser figure. The overhead I believe was double, the half gallon was double the quart, and the delivery probably was double the quart.

Q In other words, was the spread between the raw milk price and the price that Borden was charging A&P 12 cents on the half gallon or something less than 12?

A Something less than 12 cents.

Q On the half gallon.

A On the half gallon. It wasn't exactly double. It was a differential downward from 2 quarts. You saved a little money in the half gallon.

Q And what about the gallon.

A Well, the gallon, there is still a further differential.

Q In which direction?

A Downward direction because you have now only one single wall and there is a saving in delivery somehow in the gallon size too.

Q Now, following the New YOrk private label arrangement, I believe you told us that Mr. Archer spoke to you about the possibility of negotiating a private label arrangement for Chicago between yourself and Mr. Archer in New York, is that correct?

A Yes, that is right.

Q In discussing that subject with you did Mr. Archer mention anything about the Woodstock plant in Chicago?

A Oh, yes.

Q What did he say?

A Well, when this New YOrk private label deal started in New York it was in November of 1964 and it was at that time that this Woodstock plant opened in Woostock, Illinois. This was a new, modern plant that the Borden Company had built out there and Archer talked to me, every time he talked to me he talked about this plant and how great it was. He weaid it was the most modern, largest plant in the world. It had labor-saving devices in there, push button equipment where you push the button and the plant operates all by itself. He said this plant is going to have low cost production, below anything there was, and he suggested that this will give us low price milk out there in Chicago which we can pass on to A&P and pass on to our other Borden customers, and he wanted me to come out and see it because he just didn't think that I quite comprehended how great this plant was.

Q Did you go out to see it?

A No, I didn't go out to see it. He wanted me to fly to Chicago and drive on up there and I didn't have the time to make the trip.

MR. McINERNEY: Now may we have what has been marked Commission Exhibit 263?

By Mr. McInerney:

Q I believe you have identified this already, Mr. Smith, as the submission that was given to you by Mr. Bartels about the date that it bears, October 1, 1965, if I recall correctly.

A Yes, that is right.

Q Now, in testifying with respect to that I believe you started to describe that document and never quite finished your description of it and I will come to that a little later on, but if I recall correctly, thereafter one of the first questions Mr. Stone asked you this afternoon was whether, after receiving that and after taking various steps, you ultimately approved the acceptance of the Borden proposal.

A Yes, sir.

Q Now, what were the various steps that you took between the time of receipt of that and your acceptance of the Borden proposal?

A The first thing that I needed to clear up was the letter of availability that came with this offer.

Q If you will excuse me just one moment, there is another document that has been marked here as Respondent A&P Exhibit 2. Now, is that the document that you refer to as the letter of availability and does that document also appear as part of Commission Exhibit 263?

A Yes.

Q I'm sorry, I interrupted your answer.

Would you please read back where the witness was when I asked him that question?

(The reporter read from her notes as requested.)

By Mr. McInerney:

Q I apologize for the interruption. Would you continue?

A Yes. Well, this letter states from Borden to Elmer Schmidt, you have our price quotations dated September 21, 1965 for milk, cream, and other dairy products in several areas in Indiana and Illinois. We wish to assure you that our prices are proper under applicable law and we are prepared to defend those prices.

Now, there was no letter of availability came with this offer and we customarily get from each milk supplier a letter of availability to assure us that the offer being made to us is in fact available to the other customers on a proportionate equal terms. I called Barry Archer and talked to him about

this --

Q Was your discussion on the telephone or in person?

A Well, I called him and told him about this and he, as he often did since he was only five minutes walk away from my desk, he walked over to my desk and we discussed it there.

Q Will you tell us what was said by each of you on that occasion?

A And I tol him that this was not a satisfactory letter of availability as far as I was concerned because availability is not mentioned in the letter. And he said, "Well, yes. This is a letter of availability. This is your assurance that this offer is being made available to other customers on a proporational, equal basis and, further than that, that this letter protects A&P in all events. Generally, a letter of availability means just that, but this is an all-encompassing letter.' And he inferred that we were lucky to get such an all-inclusive document.

Q I'm sorry. I am not sure what your all-inclusive terminology means. Can you tell us?

A Well, a letter of availability would simply assure us that the company, the dairy, the seller, is going to make this available to his other customers and so that it would be -- that would be our assurance, but this would seemingly hold us harmless in all events, whatever they may be, so you have -- I can't tell you what that might ever include, but it will be a letter of availability and anything else that may ~~raise.~~ arise So he touted this to me as being an especially fortunate document as far as I was concerned.

MR. WHITE: I would like to make a motion to strike the answer insofar as the witness' interpreting the language and not giving us the conversation that actually took place between himself and Mr. Archer.

JDUDE HINKES: Well, let's be sure we understand exactly what Mr. Archer told you as distinguished from what you may have understood him to mean. Would you tell us once again, Mr. Smith, exactly what he told you when you said that there was no letter of availability?

THE WITNESS: Well, I have to paraphrase it, Your Honor, because I don't have the verbatim conversation.

JUDGE HINKES: As nearly as you an.

THE WITNESS: But the gist of the message was that this is a letter of availability and this assures A&P of the availability to Borden's other customers, and he used such words as they were to lead me to believe that this is more than --

MR. WHITE: I object, Your Honor. Tell us what --

JUDGE HINKES: Tell us what words he used or the approximate words, if you can't remember the identical words.

THE WITNESS: Well, it would seem that "All-encompassing" would be the kind of words that he used here.

JUDGE HINKES: Did he represent to you that this was the same as a letter of availability and even more than a letter of availability?

THE WITNESS: That is right, sir.

JUDGE HINKES: Now, what language of his did he use to convey that impression to you as best you can remember?

THE WITNESS: I would say that he used words like "all-encompassing".

JUDGE HINKES: Very well.

THE WITNESS: My objection to Mr. Archer at that time was "Why don't you just give us a letter of availability like you always do," and so he was apparently defending --

JUDGE HINKES: Well now, what did he ~~answer~~ when you said that?

THE WITNESS: That this is a letter of availability and it is my assurance that it is available to the other customers.

JUDGE HINKES: Very well.

By Mr. McInerney:

Q And did he also tell you in words substantially that this was a representation that A&P would be held harmless in all events?

A That is the gist of what he was talking about.

MR. MATHIAS: I object to that.

MR. WHITE: I object to that. Again it is the gist.

Now he is trying to put words in the witness' mouth, and the witness has something to add to the conversation and I thought he had concluded it.

MR. McINERNEY: The witness himself had used the words "hold harmless" previously. I did not invent those words. I think the record will so show.

JUDGE HINKES: Well, you have to be very careful, Mr. McInerney. You must remember this witness is a former employee of your client.

MR. McINERNEY: Yes, Your Honor.

JUDGE HINKES: And under those circumstances your freedom of cross-examination has to be somewhat limited so that perhaps what Mr. White might ask him is not exactly the same thing that you would be permitted to ask him.

MR. McINERNEY: Your Honor, I want the witness to understand, and I hope Your Honor will instruct him, that it is not incumbent upon him to reconstruct verbatim what happened; if he can give us the substance of the conversation that that is sufficient.

MR. WHITE: And that is what his Honor asked him and that is what he gave.

JUDGE HINKES: Yes, that is what he had given. Of course if we try to elaborate upon the answer we run into some very great dangers by suggestion, if nothihg else.

MR. CRONE: Your Honor, in this light I think it is becoming clear that Mr. McInerney is beginning to put in a defense and that he is using the witness, which is obviously a friendly witness. Thus I would suggest that it would be appropriate to limit Mr. McInerney to the type of questions which might be asked on direct examination.

MR. McINERNEY: Your Honor, I am not. If the suggestion is that this was leading the witness in some way, I picked up some language that he used and asked him if that was part of the substance of the conversation. That is all.

JUDGE HINKES: Well, let me see if we can get this back on the track again.

Mr. Smith, once again, tell us what Mr. Archer told you in the words that he used, or in the substance of the thought that he conveyed. What did he tell you about this letter?

THE WITNESS: Well, I believe my problem at that time was a lack of a letter of availability. When it was determined that this was a letter of availability I was satisfied --

JUDGE HINKES: Well now, wait. I don't think you are following my question. You were concerned about what you thought was a missing letter of availability?

THE WITNESS: Yes, sir.

JUDGE HINKES: YOu asked Mr. Archer about a letter of availability, why he did nto supply it?

THE WITNESS: Yes, sir.

JUDGE HINKES: Now then, he answered what?

THE WITNESS: That this is a letter of availability, this is my assurance.

JUDGE HINKES: Now, did he add anything to that observation? Did he say anything more about that letter than that it was a letter of availability?

THE WITNESS: Yes. He indicated to me that this is more than a letter of availability.

JUDGE HINKES: And what did he say, it was in being more than a letter of availability? If anything.

THE WITNESS: Because Borden would hold us harmless.

JUDGE HINKES: Mr. Archer represented to you that Borden would hold A&P harmless, is that what you are saying?

THE WITNESS: In connection with these prices, yes, sir.

JUDGE HINKES: In connection with these prices. And that that was the effect of that letter?

THE WITNESS: That is right.

JUDGE HINKES: Very well, you may continue, Mr. McInerney.

By Mr. McInerney:

Q Did Mr. Archer tell you how this letter came to be prepared?

A He said it was prepared by the Borden lawyers and he made some statement about the fact that naturally Borden was an honorable company like A & P is an honorable company and they wouldn't do anything illegal in an operation as important as this one.

Q Can you presently recall anything else with respect to that conversation?

A No, I don't believe there was anything further on that conversation.

Q Now, again going back to Mr. Stone's question about after taking various steps you finally accepted this quotation, what was the next step?

A I sent it to the Legal Department for their approval.

Q And after that?

A Then I called the Chicago people out there, Bartels, to tell him that this was approved and he could accept it, he could put it into motion.

JUDGE HINKES: Did you call or did you write?

THE WITNESS: I called and confirmed it, sir.

By Mr. McInerney:

Q How did you compare at that time the Bowman prices and the Borden unit prices on the various products? In other words, you had two bids, two quotes, before you and did you look to see what the prices were per quart, half gallon and gallon on each of those quotations and compare the two of them?

A I observed that the Bowman and Borden quotations were very close to each other, that the gallons and half gallons were quite close. The quart, as a matter of fact, that Bowman was lower than Borden, and on the half gallons and gallons the difference was almost infinitesimal, it was so small.

Q And even though the difference may have been infinitesimal, you at that time decided to accept the Borden quotation, is that right?

A That is right. The document itself looks to be a much more attractive, considerably more attractive offer.

Q Which document, sir?

A The document that Mr. Bartels sent with this letter shows that the Borden offer is substantially better than the one from Bowman.

Q In other words, the document prepared or sent to you by Mr. Bartels indicates that the Borden offer is more attractive than the Bowman offer?

A Yes, sir.

Q And yet, if I understood you correctly, comparing the kunit prices, the difference was infinitesimal at best?

A Yes.

Q Now ---

A It was a matter of mills. Maybe "infinitesimal" isn't a good word there. It was small, mill differences.

Q And on the quarts, for example, the Bowman quotation was better?

A Was actually lower, yes.

Q Now, did you at that point in time examine each of these quotations in detail to make your own analysis as to whether the Bowman quotation or the Borden quotation was better from the point of view of A & P?

A No, I did not.

Q Have you done so since at my request?

A Yes.

Q And can you tell us what the result of that analysis is?

MR. STONE: Your Honor, I would object. I believe the documents speak for themselves.

MR. McINERNEY: Your Honor, I don't see how there can be any debate about this. I think the witness' answer will show that the documents do not quite speak for themselves.

JUDGE HINKES: I will overrule the objection, but let me understand, Mr. Smith. You originally said that the Borden bid was much better than the Bowman.

THE WITNESS: Yes, sir.

JUDGE HINKES: Whose language was that? Who thought so? You or Mr. Bartels?

THE WITNESS: Well, he said it to me, and the figures at the bottom of the line here look like, yes, that is right, it looks from the document he sent me that, yes, that is right.

MR. McINERNEY: Would you identify the document you are speaking of?

JUDGE HINKES: That is 263?

THE WITNESS: Yes. It is this 263.

MR. McINERNEY: Is it 263-B?

THE WITNESS: 263-B is the summary of the one versus the other one, yes, sir.

JUDGE HINKES: And then you have subsequently made a closer examination of the figures and a comparison, is that correct?

THE WITNESS: Yes, I have.

JUDGE HINKES: At the request of Mr. McInerney?

THE WITNESS: Yes , I have.

JUDGE HINKES: You may continue, Mr. McInerney.

By Mr. McInerney:

Q Mr. Smith, 263-B is what you were referring to before, when you said that despite the fact that the unit prices appear to be very close there was something there that made the Borden bid seem better than the Bowman bid, is that correct?

A Yes.

MR. McINERNEY: I am sorry. There was a pending question and then there was an objection. Would you read back that question?

(The question was read by the reporter.)

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THE WITNESS: In closer examination of these documents we found, I found, that the Bowman bid was based on a higher raw milk price than the Borden bid, and I also found that the Borden bid was based on a 3.4 butterfat product, whereas Bowman's bid was on the basis of the 3.5 butterfat product.

By Mr. McInerney:

Q Can you tell us what the significance of those differences is?

A Well, my method here was to change them both to the same raw milk price and change them both to the same 3.5 butterfat price, and in doing that in all three cases -- the quarts, the half gallons and the gallons -- the Bowman bid was a lower bid than the Borden bid when they were both put on a comparable basis from the standpoint of the cost of the raw milk and the butterfat content of the finished product.

Q Is it customary in the dairy industry that a customer like A & P can obtain either 3.4, 3.5, 3.6 or whatever butterfat content is legal that the customer wishes?

A Yes.

Q And so with those adjustments, which offer was the better offer from the point of view of A & P?

MR. STONE: Again, Your Honor, I think the documents speak for themselves.

JUDGE HINKES: No. I will allow the witness to answer.

THE WITNESS: The Bowman bid has lower prices and I would say that it is the bid that should have been accepted.

By Mr. McInerney:

Q Was the Bowman bid comparable to the Borden bid on the subject of whether private label was being offered and only private label being offered?

A No, I think both bids were predicated on supplying private label and the brand label. They would both be offered and stocked to some extent in the stores and the Bowman label was quoted to Mr. Bartels at the same prices as the A & P label, whereas the Borden label was quoted as a substantially higher figure.

Q Well, my question, sir, was: examining the two quotations that you received ---

MR. STONE: Excuse me, Your Honor, I would move to strike the last answer on the basis that the witness indicated it was sheer speculation. He said, "I think--" and then went on.

MR. McINERNEY: Your Honor, I really think this is improper impairment of the examination. We are trying to get the witness' best recollection, and I will clarify this if there is anything unclear about it.

JUDGE HINKES: You may go on. I will deny the motion to strike. We will let the answer stand and argument may be made on the probative worth of such an answer.

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MR. McINERNEY: Your Honor, I don't know quite where we are. I am just going to ask Mr. Smith to continue in his own words.

THE WITNESS: Well, at this late date it is evident to me that if this document had been prepared and analyzed properly at the time, the Bowman bid would have been the more attractive of the two.

By Mr. McInerney:

Q But you were speaking before the interruption about the two quotations before you being for private label milk, as I recall.

A Yes.

Q My question was: Were they both for private label only?

A No, they were for private label and their own respective advertised brands, the Bowman brand for Bowman and the Borden brand for Borden.

Q In the case of Borden, was there a difference between the price being offered for the Borden brand and the private label?

A Yes, there was.

Q In the case of Bowman, was there any difference between the price being offered for the Bowman brand and the private label?

A No, they were both the same.

Q In other words, from the document before you, the Bowman quotation, that quotation is for those prices whether you took private label or Bowman label, is that correct?

A That is correct.

Q But that is not true of the Borden quotation on private label?

A That is also correct.

Q Now, did you ever discuss with anyone from Borden what A & P's out-of-store price would be on milk or dairy products in Chicago?

A No, never.

Q Did anyone from A & P in your presence ever discuss that subject with anyone from Borden?

A No, sir.

Q Does Borden still supply milk to A & P in Chicago?

A No, sir.

Q As of when, if you recall, was that discontinued?

A Within the last two years, less than two years.

Q And why?

A A better quotation was received from Dean Foods.

Q I am sorry, I didn't hear the end of that.

A A better quotation, a better offer, was received from Dean Foods.

Q Did Mr. Archer in the conversation that you had with him with respect to this letter that you have been describing as the letter of availability, did he ever mention meeting competition with respect to this Borden quotation?

A Never.

Q Did he ever tell you that the Borden quotation was based on "anyhow accounting"?

A No.

MR. McINERNEY: That is all, Your Honor.

JUDGE HINKES: Mr. White.

MR. WHITE: I wonder if we might have a brief recess, Your Honor?

JUDGE HINKES: Very well.

(Brief recess.)

JUDGE HINKES: You may examine, Mr. White.

CROSS-EXAMINATION

By Mr. White:

Q Mr. Smith, earlier today you described the A & P structure in the sense that you indicated that in the buying function that there was a headquarters operation and then there was a ~~distric~~ division operation and a unit operation in 1965?

A Yes.

Q Was the buying function within A & P a separate department itself, or did the buyers engage in other activities, such as a selling function?

A No, the buyers have always operated as a separate function all the way through.

Q And this was true in '65 at the unit level and at the divisional level and at the headquarters level?

A Yes.

10 Q Was there within the unit level, down at the lowest level, so to speak, was the unit departmentalized in that it had a buying department?

A Yes.

Q What other departments were there functioning at that level?

A There was a buying department, selling department, the office, shipping department, warehouse department, traffic department, and if they had a bakery it would be a bakery department.

Q Now, which department was it that made the decision, if it was made at a departmental level at the unit, as to what A & P would sell a product for out-of-store?

A That would be the sales department.

Q And this would be true in 1965, '66, '67 and '68?

A Yes, sir.

Q Does the sales department have a line of reporting up to the headquarters?

A Yes, they do.

Q Would you briefly describe what that would have been in 1965?

A Yes. They report from the unit to the divisional director of sales, and he in turn reports to the headquarters director of sales.

Q Now, to bring this down to the Chicago unit and the Middlewest Division in that 1965 time period -- I realize the

11 structure altered a little later, but basically looking at the period '65 through '68, as I understand it, Mr. Bartels was at the divisional level responsible for the buying function?

A That is correct.

Q And Mr. Elmer Schmidt was at the unit level, is that correct, sir?

A That is correct.

Q And he was a buyer?

A Yes, sir.

Q And he reported to Mr. Bartels --

A Yes, sir.

Q -- who in turn reported to you.

A That is right.

Q But at the same time he also reported to the president of his division?

A That is also correct.

Q Now, during that period of time, sir, who was Mr. Bartels' counterpart in the sales function?

A That was Mr. John White. Now wait a minute. Wait a minute. No. I beg your pardon. That was Bob Gamble.

Q And to whom did Mr. Gamble report?

A Mr. Gamble would report to Mr. LePage at headquarters.

Q And what was Mr. LePage's title?

A He was the vice president in charge of sales.

Q Going back to the unit level now, where I perhaps should

12 have started, who was head of sales at the unit level?

A That was John White. Elmer Schmidt and John White were the two buyers and sellers for the buying and selling departments.

Q And Mr. White reported to Mr. Gamble?

A That is correct.

Q Now, as the director of purchasing, did you have any authority with respect to the sales department?

A No, sir.

Q And, sir, to the best of your knowledge, did your counterpart who was in charge of sales exercise any jurisdiction over the company's buying department?

A No.

Q These were completely separate functions?

A Completely separate.

Q Now, this morning you mentioned that in the years 1962 and '63 you were handling the purchasing of dairy products in Metropolitan New York City?

A Yes.

Q But that you had not yet assumed the responsibility of coordinating national purchasing?

A Yes, sir.

Q Now, who was the gentleman that had the position at that time?

A That was Mr. Mylott.

Q We have had a lot of conversation today about this milk

13 plant that A & P built in Pennsylvania. I believe you said at Fort Washington?

A That is right.

Q Is that near Philadelphia?

A Yes, it is a suburb.

Q And this was a brand-new milk plant?

A Yes, sir.

Q A rather sizeable operation?

A I imagine it could be classified sizeable, yes.

Q Well, generally speaking, what area of A & P stores did it serve?

A Well, initially when they opened it, they hoped to serve the Philadelphia unit only.

Q And did they later serve beyond that area?

A Later they enlarged the plant and served some adjacent areas where it looked like it was advantageous to do it.

Q Now you were asked by several people earlier about when A & P might have announced that it was plan ning to build this plant, and for the purpose of perhaps refreshing your recollection I ask you to read that document.

A Yes.

Q Does that refresh your recollection as to the general time period in which A & P announced the plan to build this milk plant?

A I wouldn't say it refreshes my recollection, but I see the document and it is quite obvious this is an announcement, so I guess -- see, I didn't have any memory of when it was, but now you have shown me a document that tells me.

Q Well, aside from reading this document, do you now recall that A & P made this announcement at least in part in its annual report that came out for the year 1963?

MR. McINERNEY: '63?

MR. WHITE: Yes. The fiscal year '63.

By Mr. White:

Q What is the fiscal year of A & P?

A It would be at the end of February.

Q And approximately when is the annual report published?

A About June -- May or June.

Q And do you recall whether or not this announcement ---

A No, no. I don't know, no.

Q During your direct examination you described some standards that were being used in judging proposals on private label milk products. These aren't exactly your words, but just to direct your attention to the subject matter that I am referring to, you referred to having a properly-put-together quotation, a reliable supplier, that it was a good move for A & P to make, and that it was legal.

A Yes.

Q Now, were these standards and these words or anything similar to this ever reduced to writing?

A Not to my knowledge. I think you were referring to my judgment in that testimony.

Q Well, that was what I was going to ask, sir, whether those were your standards or were ones you had communicated to either the divisional or unit levels.

A Not to my recollection.

Q These were your standards that you were using?

A That is correct.

Q Now, you gave us quite a sizeable list of places where private label programs were instituted ---

A Yes.

Q -- by mentioning names such as Boston and Springfield. Does the name of the city as you listed them indicate the A & P unit involved?

A Yes.

Q So that when we say Boston, we are talking about the Boston unit of A & P?

A That is it.

Q Which would be larger than just the city of Boston itself?

A That is correct.

Q And I think you indicated that you approved each one of these with the exception of Dallas, which you said was already---

A Preceded my being placed in charge of dairy.

Q But you approved each of these?

A Yes.

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Q And each of these met your criteria which we have just talked about?

A Yes.

Q Now, with respect to each one of these, did you receive for review a letter of availability?

A Yes.

Q And A & P received an availability letter on each one?

A An availability letter or a supplier's statement which made an availability letter unnecessary.

Q What form would that be in?

A If a supplier says, "These are the prices I charge all of my customers," you don't need an availability letter.

Q I see. I understand.

JUDGE HINKES: How does he say it? In what form?

THE WITNESS: Well, ordinarily when a supplier sends us a bid he addresses it to the man that asked for it and he tells them ---

JUDGE HINKES: Orally or in writing?

THE WITNESS: In writing.

-- and he tells them whatever he wants to tell them; and if he includes in there the fact that these are the prices that he charges either all of his customers or customers that are in the bracket, he might have customers, that might suffice.

JUDGE HINKES: But you do have something in writing from the supplier to that effect, whether it is called a letter

17 of availability or whatever it may be called?

THE WITNESS: Yes, a statement from the supplier, assuring us that this offer is being made available to other customers in the trading area.

JUDGE HINKES: And that you had from every one?

THE WITNESS: Yes, sir.

JUDGE HINKES: Mr. White.

By Mr. White:

Q Who was it who determined that A & P should ask for a letter of availability? Was that a decision you made, sir?

A Well, I believe that stems from the discussions with our legal department in which they gave us advice and counsel on the information that should be on hand to be sure that we are abiding by the law.

MR. McENERNEY: I didn't want to interrupt the witness' answer and I don't really object. I just don't want my failure to object to be deemed any waiver of privilege in the future. I don't want to impede the examination but I want to make that plain, if I may.

JUDGE HINKES: Well, I think you had better state what your attitude is. I don't know whether you mean by that to say that you wish to have a standing objection to everything the witness is saying ---

MR. McENERNEY: No, Your Honor. Insofar as the testimony that has gone so far, I think that I don't have any

13 objection. I simply think we could be here forever if Mr.White is going to examine about availability with respect to other parts of the country and the legal aspects of it, and so on, and I simply don't want my interest in expediting the examination to be taken as a waiver in some other area.

What has been said so far, I think, is just ordinary company practice and I am not really objecting. I am simply pointing out that we are at a point where I, I at some point, want to invoke privilege.

JUDGE HINKES: Very well.

By Mr. White:

Q Well, Mr. Smith, did A & P start using or asking for such a letter when you came in as national purchasing director?

A No. That preceded that. This is a long-standing practice.

Q This is something that you found in existence, a practice of A & P's that you found in existance when you came to that position?

A Yes, sir.

Q And do I understand correctly that this was required of all suppliers of products of A & P?

A Yes. You are getting quite an all-inclusive -- you are getting quite an all-inclusive question there, all the things we purchased, and you get clear down to pig's feet out in Seattle some place, and you get me in a corner when you give me that kind of a question.

19 Q I am sorry. There could be local pieces and so forth that might not have been covered in that way, but it is your general understanding that on the larger volume items that are purchased around the country that this procedure is followed?

A Yes.

Q Now, I believe you indicated that you had two conversations with Mr. Archer of Borden concerning the Chicago situation. Is that correct?

A That is correct.

Q One of them occurred in late fall or early winter of 1964 or the early part of 1965?

A Yes, sir.

Q And the other one occurred in October of 1965?

A Yes, sir.

Q Mr. Smith, I show you what has been received in evidence as Commission Exhibit 6-A through -C and ask you whether you have seen that document before.

MR. McINERNEY: If I may, I think the witness indicated earlier to a different document that he has seen it only very recently, and I take it Mr. White is not referring --

When you say "before," you mean before the filing of the complaint or some such thing?

MR. WHITE: I think my question will state.

JUDGE HINNES: Just "before." Have you ever seen this document?

THE WITNESS: No, I don't believe so. I don't believe I have ever seen that document before.

By Mr. White:

Q And obviously, then, you don't recall that Mr. Archer gave you that document?

A No.

Q Do you recall, Mr. Smith, that he gave you any document relating to Chicago private label generally in that format?

A No.

Q I take it from your answer that it is your best belief that he did not deliver any written quotations to you late in 1964 or early 1965?

A When he was over talking to me he may have had some documents in his hand that he talked from, but as far as I can remember I don't believe he left anything with me at all.

Q Did he quote any prices to you if he had documents in his hand?

A I don't recall.

Q Now you first talked to Mr. Ira Bartels about the possibility of private label in Chicago in November or so of 1964?

A Yes.

Q You said this morning that there was a meeting held in New York of the divisional buyers which Mr. Bartels attended and in which the New York program was explained?

A That is right.

Q And then this afternoon at one point you said that Mr. Bartels asked for information, written information, as to how the pricing on the New York program worked.

A That is right.

Q Was this request made at the time of this general meeting you described in New York in the late fall of 1964?

A I recall his wanting the New York prices because they were too hard to write down, could he get a copy of them. I recall his asking for those.

Q But it was at this same time?

A At this meeting in New York at the Graybar Building, yes, sir.

Q And your next communication with anyone within the A & P organization was the February 1965 telephone call ---

MR. McINERNEY: I would object to that.

MR. WHITE: I have not done with the question.

MR. McINERNEY: Oh. I am sorry.

By Mr. White:

Q --- the February 1965 telephone call to the Chicago office of A & P concerning private label or A & P stores in the Chicago area?

MR. McINERNEY: I think that question is a little confusing.

MR. WHITE: I will be glad to rephrase the question if you are objecting to it.

JUDGE HINKES: Can you answer that, Mr. Smith?

THE WITNESS: If he is referring to the document that was presented to me here this morning at the desk which looked like somebody's handwritten telephone message from the Chicago end of a telephone call ---

JUDGE HINKES: Is that what you are referring to, Mr. White?

By Mr. White:

Q Well, I believe you testified this morning that in February of 1965 you called Mr. Bartels, is that correct?

A I talked to Mr. Bartels, yes.

Q Well, was it a telephone call?

A Yes, it was a telephone call. He may have called me, but I am not too sure where it originated.

Q Fine. You are not sure who originated the call, but there was a telephone conversation with him in February of 1965?

A That is correct.

Q Now my question, sir, is: Between the time that he was at the late fall meeting in New York City in 1964 at which time you explained to the seven district buyers the New York milk program for private label for A & P stores, and at which time he asked you for written copy of how the pricing worked, between that time and February when the two of you talked on the telephone, did you discuss a possible private label program in the Chicago area for A & P with any other A & P representative?

23 A No, I didn't.

Q I believe your next communication that you testified to regarding this matter took place in August 1965?

A Yes, sir.

Q That again was a telephone conversation with Mr. Bartels?

A Right.

Q And that is the conversation in which he described to you the Borden offer which would allegedly save A & P $410,000 or $420,000 a year?

A Yes, sir.

Q Now, between the February 1965 telephone discussion with Mr. Bartels and the August telephone conversation with him to which we have just referred, during that interim period did you discuss with any A & P representative the private label program or the possibility of it for A & P stores in the Chicago area?

A No.

Q Following your August 1965 telephone conference with Mr. Bartels, your next contact was another telephone conversation with him in early September 1965, is that correct?

A That is right.

Q And during that interim period you did not speak to any other A & P representative about the Chicago private label?

A No, sir.

Q And then following that, your next communication was the letter you received from Mr. Bartels, is that correct?

A That is correct.

Q And your next communication with the Middlewest District or with the Chicago unit was when you called later in October and told them you had approved for Borden to be the supplier of the private label program and you would confirm it in writing?

A That is right.

Q So then I am correct that at no time prior to your communicating approval of Borden as the supplier for the Chicago area stores for private label for A & P had you discussed this matter in any way with Elmer Schmidt?

A No.

JUDGE HINKES: That is, he is correct?

THE WITNESS: Yes, he is correct. I had not communicated with Elmer Schmidt.

By Mr. White:

Q And is Mr. Bartels the only person at the district or unit level with whom you had discussions within the A & P organization concerning the private label program for Chicago as of the time you received the October letter marked Commission Exhibit 263? Would you like that read back?

A Well, if you are referring to Frank Carvar -- is that what you are getting at in this question?

Q I don't know who I am referring to; that is what I am trying to find out.

A Ira Bartels has an assistant, Frank Carver, and as I called Ira Bartels to tell him this was approved it is my recollection that Frank Carver answered the telephone in Ira Bartels' absence and I told Frank Carver that this was approved; so when you ask me did I talk with anybody else, I have to say yes, I talked to Frank Carver.

Q Well, I realized near the end you had talked to somebody else. That is why I cut it off with the receipt of the letter and the bid material marked Commission Exhibit 263, sir.

A This is a technical point, but I don't know whether that is what you are getting at or not. There was nobody else.

Q But there was nobody else?

A That is correct.

Q I hand you what has been received in evidence as Commission Exhibit 263. Would you identify Mr. Vogel who is referred to in 263-A?

A Yes, Mr. Vogel is the President of the Middlewestern Division -- was the President of the Middlewestern Division at the time this letter was written.

Q Yes, and I think this morning in interpreting the handwriting thereon, you said that Mr. Gamble was ---

A Director of Sales.

Q Director of Sales for the Middlewest Division?

A Director of Sales for the Middlewestern Division.

Q Not all of A & P?

A No, sir.

Q Now, was Commission Exhibit 263 sent to you in the mail?

A Yes, sir.

Q And is mail received in your office stamped at the time it is received?

A Not at my desk, no. Some departments do and some don't. It was not my practice.

Q Do you know of any record as to the day when it was received?

A No, I don't.

Q Now then, you said that you were surprised when you received the letter and looked at it?

A Yes.

Q And you telephoned Mr. Archer?

A Yes.

Q About how long was it after you received the letter that you telephoned him?

A Well, it would be some place between the time I received this, which might be any place from October 1 upto October 15, in a two-week period in there.

Q Well, you still had to submit it to the Legal Department, didn't you?

A Yes, sir.

Q And I think you testified that you talked to Mr. Archer before you sent it to the Legal Department?

27 A Yes. It is my custom to send them a xerox copy of this kind of material so that wouldn't necessarily interfere with the conversation with Mr. Archer.

Q What is your best recollection as to when you talked to him:at the beginning or the middle or the end of this period that you have described?

A It would have to be an estimate on my part. There is just no way I could reconstruct it. I would think it would be promptly, but not necessarily.

Q Well, had you heard from the Law Department before you talked to Mr. Archer?

A Well, there again, I believe I talked to Mr. Archer before I talked to anybody from the Legal Department.

Q So at least that gives us some sequence to it.

Now, you said you telephoned Mr. Archer. Would you tell us what was said in that telephone conversation? Did you invite him to come over?

A It would have been a factual statement to the effect that "I have received this offer from your people in Chicago and attached to it is a letter that doesn't give me a letter of availability ~~recommendation authority~~, and I would like to talk to you about it," and so, as is customary with him, he came over and talked about it at my desk.

Q Did he come right over?

A Yes, he did.

Q He responded relatively immediately to your call?

A Yes.

Q And how long was your conversation with him in your office?

A I don't believe that took very long.

Q Well, did it take 15 minutes?

A Probably 15 minutes.

Q And who was present besides yourself?

A The two of us. Nobody.

Q Did you ever reduce to writing the substance or any part of this conversation?

A No, I didn't.

Q Would you tell us again exactly as best you can and in the sequence that you remember it what was said?

A I told Mr. Archer that this letter that came in with this offer from Chicago was not a letter of availability as we customarily get. And he assured me that this was a letter of availability and he told me that this was more than a letter of availability.

Q Anything further?

A No. That is the substance of it.

Q I see. There is nothing you would like to add to that?

MR. McINERNEY: I assume ---

MR. [illegible]: I don't want an informative objection [illegible] We have had enough answers.

JUDGE HINKES: What was your answer to the last

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question, Mr. Smith?

THE WITNESS: That he assured me that this was a letter of availability and it was in fact more than a letter of availability because of his statement of their being prepared to defend these prices.

MR. WHITE: Are you finished, Mr. Smith?

THE WITNESS: Yes, I am through.

MR. WHITE: I just didn't want to interrupt. That is why I was waiting.

By Mr. White:

Q Now, when Mr. Archer reached your office that day in October of 1965, did he have with him a copy of the Borden quotation?

A No, he didn't.

Q Did he have a copy ---

A But he acted like he knew about this.

Q But did he have a copy of Commission Exhibit 263-H?

A Not to my knowledge.

Q And did you show it to him?

A I don't believe I did.

Q Now to whom did you submit this matter in the Legal Department, the name of the gentleman or the lady as the case may be?

A I will have to guess that it is Mr. Melervey. It could have been Fred Campbell, the man in charge of the Legal Department, but I would gather it probably was Mr. Melervey. It is

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part of the record here. Mr. Campbell is in charge of the Legal Department here at A & P and Mr. Melarvey is his assistant.

Q It would have been one of those two gentlemen?

A Yes, sir.

Q Did you send him the proposal with a memorandum or a question or anything?

A I always did that.

Q With a covering memorandum asking for them to review?

A Yes, sir, I always did that, too.

Q And did the Legal Department or the Law Department respond in writing to you?

A Yes, they did.

Q Then you proceeded to grant approval?

A Yes, sir.

Q Mr. Smith, you testified in the investigational stage of this proceeding; isn't that correct?

A Yes.

Q And you appeared in Chicago and answered the questions of the Federal Trade Commission Counsel in December of 1969?

A Yes, sir.

Q Is that correct?

A Yes, sir.

Q During that time you appeared and testified, did you make any mention of the October 1965 meeting with Mr. Archer?

A I don't know whether that came up or not.

Q Would you like to review the record to see if it is there?

A Well, I believe basically I answered the questions that were asked. I am not too sure that I was in a position to discuss anything that wasn't inquired about.

Q My question is, sir, have you re-read your testimony in the last day or two that you gave in 1969?

A I have read it recently, yes, sir.

Q And to the best of your recollection did you at that time testify concerning the October 1965 conversation that you have here today testified about with Mr. Archer?

A It doesn't come back to me, no.

Q You mean you don't recall whether you did or not?

A No, I don't recall. I read through the testimony, but somehow that didn't make that kind of an impression on me.

MR. WHITE: Could we have a very brief recess?

JUDGE HINKES: Very well.

(Brief recess.)

JUDGE HINKES: Mr. White.

By Mr. White:

Q Mr. Smith, between the time that you received Commission's Exhibit 263 and the time that you called Mr. Carver and advised him that you were approving the private label program with Borden as the supplier in the Chicago area, did you discuss any aspect of that program or the quotations or the letter with anyone at A & P's Middlewestern Division or in its Chicago unit?

A No. 2048

Q What was your understanding of Mr. Archer's position in October of 1965?

A He was in charge of the Milk and Ice Cream Divisions of the Borden Company. He was a director of the company and his assignment was milk and ice cream. That was my understanding of his position.

Q Yes, he was President of the Milk and Ice Cream Division, as you understood it?

A Yes, sir.

MR. WHITE: Thank you. That is all.

JUDGE HINKES: Mr. Stone.

MR. STONE: I think, Your Honor, I would ask your indulgence and request a brief recess.

JUDGE HINKES: I would have hoped that that could have been accomplished in the last recess and these subsequent questions have certainly not affected your redirect examination.

MR. STONE: No, Your Honor. The problem is that this witness on cross-examination has testified to a number of matters which he gave no indication of in any testimony prior to that and we are trying to work out our line of questions so that we can expedite the examination when we do start.

JUDGE HINKES: Well, I won't prolong this. We'll take the recess at this time, but let me say that I don't think this is the proper way of handling it at all. I think that when

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we take a recess upon a representation that Mr. White is about finished with his cross-examination, that you should use that time to prepare for your redirect if you have any.

We don't have to take two successive recesses with an interval of only two questions in between. That is hardly an expeditious use of our time.

We will take a very short recess at this time.

MR. STONE: Thank you.

(Brief recess.)

JUDGE HINKES: Mr. Stone.

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REDIRECT EXAMINATION

By Mr. Stone:

Q Mr. Smith, you mentioned in connection with the testimony you gave at Mr. McInerney's behest that you had conducted an examination at a later time of the Borden bid and the Bowman bid, and had drawn certain conclusions.

A Yes, sir.

Q And that this was done at Mr. McInerney's specific request?

A Yes, sir.

Q Was that study made in any way in connection with this litigation or the allied litigation?

MR. McINERNEY: I am not sure the witness knows what the allied litigation is. Perhaps we could just drop that.

JUDGE HINKES: Let's separate that if we can.

MR. STONE: In this litigation?

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2050 THE WITNESS: This difference started to be revealed as we studied this document carefully. There are many pages here. And the inconsistency of the raw ---

By Mr. Stone:

Q I asked you when the study was made.

MR. McINERNEY: "When was the study made?" Is that the question?

JUDGE HINKES: Yes.

MR. STONE: That is what I said, yes. When was the study made?

JUDGE HINKES: The study which led to his realization that the price was based upon a higher raw milk cost and a higher butterfat content.

MR. STONE: And at Mr. McInerney's behest.

THE WITNESS: Yes. I am not sure what the date was. Probably within the last eight months.

MR. STONE: Thank you.

No further questions, Your Honor.

JUDGE HINKES: Let me understand something, Mr. Smith. You got Commission Exhibit 263 from whom?

THE WITNESS: From Ira Bartels.

JUDGE HINKES: And you got that back in 1965?

THE WITNESS: That is correct.

JUDGE HINKES: Mr. Bartels, if I understand your testimony, thought that the Borden price was better than Bowman's?

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THE WITNESS: Yes, sir.

JUDGE HINKES: And you thought so, too, at the time?

THE WITNESS: Yes, that is correct.

JUDGE HINKES: And you approved the contract?

THE WITNESS: Yes, sir.

JUDGE HINKES: Had you approved other contracts of a similar nature in the past before that time?

THE WITNESS: Yes, sir.

JUDGE HINKES: In connection with your work at A & P?

THE WITNESS: Yes, sir.

JUDGE HINKES: You were quite familiar with the dairy industry, I presume?

THE WITNESS: Yes, sir.

JUDGE HINKES: Do I understand from your testimony that when you approved the contract you were unaware of its provisions?

THE WITNESS: I was unaware that it had been prepared in a manner in which the two things that were being compared were not being compared on an equal basis.

JUDGE HINKES: But did you know that the Bowman price was based on 3-1/2 percent butterfat?

THE WITNESS: I didn't check that, sir.

JUDGE HINKES: Did you know that it was based upon a higher raw milk cost?

THE WITNESS: I didn't check that, either.

JUDGE HINKES: Now I call your attention to Exhibit 263-E, which refers to the calculation of prices by Bowman and I call your attention to the first two paragraphs on that page, if you will take a look at them.

THE WITNESS: Yes, sir.

JUDGE HINKES: You will notice that one refers to a specific raw milk price and the other refers to a specific 3.5 butterfat.

THE WITNESS: Yes, sir.

JUDGE HINKES: Were you unaware of those provisions when you approved the contract?

MR. McINERNEY: Your Honor, if I may, that isn't the contract he approved. Again, I don't want to in any way ---

JUDGE HINKES: No. I am asking him if he was unaware of those calculations upon which the Bowman price is based when he approved the contract.

THE WITNESS: Yes, I was unaware of this.

JUDGE HINKES: How can that happen?

THE WITNESS: Well, it wasn't the practice at headquarters of A & P to go through the details of this sort in trying to check out the accuracy of the work that had been performed out in the units and the divisions, and I didn't check this one nor the ones that preceded it. This was not the practice at this level of the company.

JUDGE HINKES: Apparently Mr. Bartels didn't check that, either.

THE WITNESS: He didn't check it either, as nearly as I could determine.

JUDGE HINKES: Well, who checks that basic price formula, if anyone?

THE WITNESS: Well, Your Honor, this is wrong; this is poorly put together. It is a poor piece of workmanship.

JUDGE HINKES: "This" meaning the ---

THE WITNESS: And I am ashamed of it.

JUDGE HINKES: When you say, "This is wrong," what are you referring to?

THE WITNESS: The comparison of Bowman and Borden's bid on a basis which is not uniform.

JUDGE HINKES: Yes, I understand the comparison was improper.

THE WITNESS: Yes, sir.

JUDGE HINKES: But what I am trying to find out is how such an improper comparison goes through the various levels of A & P without ever being discovered.

THE WITNESS: The bulk of the clerical help is in the units of the company. At the division level it is mostly men and secretaries. At the headquarters level it is mostly men and secretaries. They are not equipped to do this sort of thing and they don't do it. So I am sorry to say this sort of thing did happen, could happen.

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2054 JUDGE HINKES: I have nothing else.

MR. STONE: Your Honor, I do have one further question.

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FURTHER REDIRECT EXAMINATION

By Mr. Stone:

Q Referring, Mr. Smith, to the page to which the Judge directed you, is the 3.5 percent on that page the figure you used?

A 3.5, yes, sir.

Q Thank you. And this is where you got the 3.5 percent figure?

A Yes, sir.

MR. STONE: That is all, Your Honor.

MR. McINERNEY: Your Honor, I just have one clarifying thing. I think Your Honor was asking whose basic responsibility it was to check this sort of thing out, and I am not quite sure that the witness completely answered your question.

JUDGE HINKES: Well, you may go ahead if you wish to ask.

RECROSS-EXAMINATION

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By Mr. McInerney:

Q At what level would you have expected this to have been checked out, Mr. Smith? I think you have told us that at the headquarters you didn't customarily go over these figures in detail.

A No.

Q And that at the divisional level it was basically men and secretaries, and the clerical help was on the unit level.

Now would you tell us whose responsibility basically it was to check out this kind of thing?

A The job would fall under the Treasurer's Department, in my opinion.

Q Well, I was wondering where we are. Are we at the unit level?

A Yes, we are at the unit level.

Q And who was the unit buyer at this time?

A This was Elmer Schmidt.

Q And as far as you know, was Mr. Schmidt an experienced buyer of dairy products at this time in October of 1965?

A No. We didn't have any experienced dairy buyers in the company, private label buyers. It was a new experience for us and we didn't have anybody that had that experience.

MR. McINERNEY: That is all I have, Your Honor.

JUDGE HINKES: Anything else, Mr. White?

MR. WHITE: Nothing further, Your Honor.

JUDGE HINKES: Thank you. You may step down.

(Witness excused.)

JUDGE HINKES: About tomorrow's arrangements, we are to start tomorrow at 9:30 and if I understand correctly we are going to have Mr. Bitting at that time.

MR. MATHIAS: Yes, Your Honor.

2056 JUDGE HINKES: We will carry through with the witness through our normal lunch period, but we'll have to break off shortly thereafter because of my prior commitments. And if we haven't finished with him at that time, we will possibly be able to use him on Friday; but if we do, it will be Friday morning. / Is that the arrangement?

MR. WHITE: No. The understanding was that they would call the other witness on Friday.

JUDGE HINKES: They are calling the other witness, that is right, but in the event that Mr. Bitting was not finished ---

MR. MATHIAS: In the event we felt we needed to cover a little more territory with Mr. Bitting, we might start out first thing on Friday morning with Mr. Bitting. We would hope that that would not be necessary.

MR. WHITE: Your Honor, for the little time involved, I think it is a tremendous expense to ask Respondent Borden to keep lawyers down here. We have the afternoon, Thursday afternoon. Admittedly, it can't be very much on Friday. Mr. Bitting is here in Washington. We are going to have lots of hearings in Washington, and why we really should be asked to stay over for that when there is a gap already in the afternoon ---

JUDGE HINKES: I am inclined to agree. I think that under the circumstances we ought to be able to try to fit Mr. Bitting in sometime during the following week that we will be in Washington, the week after the week of July 4th.

MR. WHITE: We would appreciate it, Your Honor.

JUDGE HINKES: So let's plan on having Dr. Solverson then on Friday, which will make the attendance by Borden Counsel unnecessary.

MR. WHITE: Yes, sir.

JUDGE HINKES: Very well. Nine-thirty, then, tomorrow morning.

(Whereupon, at 4:40 p.m. the hearing recessed, to reconvene at 9:30 a.m., Thursday, June 28, 1973.)

price disturbance?

A They were along in it, yes.

Q Now, in connection -- you mentioned that you had dealings with the Borden Company concerning this situation.

With whom did you deal with the Borden Company, sir?

A Mr. Malone, of Chicago, and Mr. Greaves of the Midwest Law Department for the Borden Company.

Q That was Mr. Joseph Malone, was it, sir?

A Joseph Malone, yes.

Q He was out of the Chicago office?

A Yes.

Q Did you deal with anyone -- I believe Borden had a Milwaukee office; did you deal with anyone from that office in connection with this matter?

A We were unable at any time during that period in our workings up there in our bureau to deal directly with the Wisconsin people.

The only time we could get any answers were -- and this was by, I guess, mutual agreement, that we had to call either Joseph Malone in Chicago or Joseph Greaves, to get any answers to any information we needed.

Q Now, sir, I hand you what has been marked as Commission 4-A-E for identification, and ask you if you can identify this document, sir.

A If I may, I brought along a copy of this document here. I would like to compare it.

JUDGE HINKES: Would counsel want to examine the document that the witness has?

MR. MC INERNEY: Is this a copy of --

MR. MATHIAS: It's his file copy.

THE WITNESS: The copy I have is the work copy that we have had in our section. This is the exhibit there (indicating).

MR. MATHIAS: You have taken our copy.

MR. WHITE: I wonder if we might have a short recess while this is done, your Honor.

JUDGE HINKES: Very well.

I guess you will want to look at the witness' own copy.

MR. WHITE: Maybe the witness wants to make the comparison, too.

JUDGE HINKES: Let's be in recess briefly while counsel and the witness, as well, make comparisons of the documents as to -- so as to be sure that they are true and correct copies, and then if there is an objection to the witness using his copy I will hear from counsel.

(Short recess.)

JUDGE HINKES: Is there any objection to the use by this witness of his own copy?

MR. MC INERNEY: No objection to that, your Honor.

We do object to the admissibility in evidence against A & P of the --

MR. MATHIAS: It hasn't been offered yet, your Honor.

JUDGE HINKES: It hasn't been offered yet, so let's wait with that.

Very well, you may continue, Mr. Mathias.

By Mr. Mathias:

Q Can you identify this document, Mr. Soberg?

A Yes.

Q What is it, sir?

A This was a cost study that the Borden Company had prepared in 1964 to attempt to cost justify their discount schedules that were in effect as of August 3, and also they were attempting to cost justify the differential between the Borden label and the second, or private labels.

Q Now, who submitted -- was this document submitted to you, or a copy of it, sir, to your department?

A Yes, it was.

Q And by whom was it submitted, sir?

A Mr. Malone, of the Borden Company, and Joseph Greaves, of the Borden Company.

Q Well, was there any other cost study submitted to your department in connection with this private label situation by Borden?

A By Borden, yes, there was -- not another study necessarily, but there was an affidavit as to the workup of the costs, how they were prepared, and what went into the makeup of this study. This was submitted by Mr. Malone.

Q This was a separate study, or just in support of this particular study?

A This was in support of this Haskins and Sells study, and the cooperation between the Bordens, or work that went into it between Borden's and Haskins and Sells, the CPA firm.

Q Mr. Soberg, at an earlier point I may have left the record a little confused.

I asked you a question concerning the number of A & P stores in the Milwaukee area, and one of my colleagues noted that the question was a little vague as to whether I was questioning you as to the number of A & P stores or stores in general.

Will you repeat again for me how many A & P stores were in the Milwaukee area during this period, August through November, 1964?

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A Well, the actual advertising of the dairies are very nominal. We had only a radio program and, to my knowledge, Dean had a newspaper program, and -- but it's not one of those kind of business that you spend a lot of money advertising.

Q Sir, can you identify for us the geographic area covered by the milk drivers' union No. 753?

A Approximately.

Q Would you do it for us, sir?

A 753 area is east of 59, and it's north of the Gary-Hammond area, as there is a local in Gary-Hammond, a teamster local, as well as one in Elgin and one in Waukegan, and I think the line north is somewhere around Route 22, south of that on the north side, and above that is the Waukegan local.

Q Would this roughly cover the Chicago and suburbs area, excluding the Indiana areas?

A Yes.

MR. MATHIAS: No further direct, your Honor.

MR. MC INERNEY: Your Honor, this witness is a former Borden employee, and I think it would be appropriate for counsel for Borden to conduct cross examination first.

JUDGE HINKES: Mr. White.

MR. WHITE: They didn't ask anything about his

AFTERNOON SESSION

1:30 p.m.

JUDGE HINKES: The hearing will be in order.

I believe you had completed your cross-examination, Mr. White.

Mr. Curnin.

HENRY A. SOLDWEDEL resumed the stand and testified further as follows:

MR. CURNIN: Mr. McInerney will cross examine the witness.

JUDGE HINKES: Very well.

Mr. McInerney.

CROSS EXAMINATION

By Mr. McInerney:

Q Mr. Soldwedel, I believe you told us this morning that when you purchased Wanzer in 1963 it was principally involved in the home delivery business.

A Yes. They had eight small wholesale routes, very small.

Q And how would you compare the profitability of the home delivery business to sales to chain stores or other retail stores?

A Well, of course, Wanzer had lost money for seven straight years, and the year before we purchased it they lost $210,000, and there is, was no way that the retail n2

business could survive with the competition from store pricing with the high distribution costs that is involved with retail; it takes a man to go up there and set off a half gallon of milk, and, you know, you just don't do that with wages that are demanded in today's scale of living.

Q Just so we understand each other, when you say "retail business" and I say "home delivery business" we both mean the same thing?

A Yes, retail home delivery business.

Q Yes.

And would you say that the cost of delivering a half gallon of milk in the retail home delivery route business was significantly higher than the cost of delivering the same half gallon of milk in sales to retail stores?

A Oh, definitely, yes.

Q So if I may, sir, and without getting into great detail or specifics, would it be true that the sales to stores in general were more profitable than sales on home delivery?

A Yes, I would say so.

Q And in the case of a dairy which had both a home delivery business and also sold to chain stores, would it be fair to say that the latter, that is, the sales to chain stores, during this period that we were talking about this morning would actually subsidize the home delivery aspect of their business?

A Well, I don't know how they would do their accounting, but, of course, everyone that was serving stores got out of the retail business. Bowman went out in '66, and they were the retail -- we were out by that particular year entirely of retail, Dean never had any retail. They assumed some of the retail from Bowman, but they turned around and sold it to distributors, and they just sold the milk at the dock to the distributors. I know of no one to -- well, I think maybe Borden could have had 21 or 22 routes out of probably $25 million dollars of business, which means nothing in retail.

Q Would you know whether in the case of a dairy which did do both, such as Wanzer at one point, when you took it over --

A Yes.

Q -- you were losing money on the home delivery business; is that correct?

A Yes, I was losing money on this -- our store routes, which I indicated was eight, and thereby -- and was very small. We had -- they had no chain store business. I -- they didn't have one customer that owned two stores. It was restaurants and small independent stores.

So --

Q And that was more profitable than the home delivery business?

A Well, I suppose if we run a cost on that route, you would say we'd make a little money on those routes, even though they might have been only ten or twelve thousand points on a route.

Q You were at the same time losing money on the home delivery routes?

A Yes, yes.

Q Now, as a general matter, you've testified as to your general knowledge of the industry and its trends..

My question was whether a dairy which did do both -- perhaps this would occur more toward the early part of the period 1963 and '64, '65, thereabouts -- was it generally understood that when a dairy did both kinds of business, chain store and retail home delivery, that the retail home delivery would be subsidized by the sales to chain stores?

MR. MATHIAS: Your Honor, I am going to object.

The witness has answered this question from his own experience, and I don't believe there's been any qualification laid for the asking of it in general.

MR. MC INERNEY: Well, he's testified as to

Wanzer, and I'm asking him as to general industry.

JUDGE HINKES: Well, let's be sure that the witness is knowledgable on that subject.

MR. MC INERNEY: Mr. Mathias has asserted that he is earlier today, but --

JUDGE HINKES: Well --

THE WITNESS: You mentioned "subsidize". I don't know whether that's the right word for me to answer it or not.

You have a profit, and you come up and you lose money in one category of business, you make a little in the others, you could still lose money in your overall business, and I don't know whether one subsidized it or not. You have a little profit out of one and you have a little profit out of the other, you know.

Q Well --

A I don't know how somebody subsidizes something in a business. I don't use that particular --

Q Well, if you don't like the word --

A I don't like the word of "subsidizing". Subsidizing is when somebody gives me money, not when I take my own money and give it to something else.

Q But put it in your own words, if you would, as to how -- one aspect of the business was more profitable than the other; is that correct?

A Yes. In your chain store business, or your wholesale business, you have a chance for more efficiencies, larger deliveries, and, naturally, you have your truck costs, your gasoline costs, and naturally, if you can drop off more milk in -- and you can drop off maybe in some of those larger chains a trailer load of milk in three stops -- that's not an exaggeration -- well, it would take 15 retail routes to deliver a trailer load of milk. So -- and if you've got enough money, I do know people that are making money today in retail business. We have distributors that are making money today in the retail business.

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Q Yes, sir. What I am asking, though, is when a dairy would have both businesses, would the added expense that you have described, was that generally made up for by the price that they were able to get from the home delivery customer --

A Yes.

Q -- or was it less profitable to deliver at home delivery and to do that aspect of the business?

MR. MATHIAS: Your Honor, I am going to object to the asking of two questions.

I believe if that question is read back, the witness has been asked two separate questions, and I think that is an improper form.

MR. McINERNEY: Let me try to rephrase it. I don't think it needs much more time on the subject.

By Mr. McInerney:

Q I was just asking whether, taking a dairy which did both, you were saying before that you made a little more money, on the one hand, in one aspect of the business, and a little less in the other, and you wouldn't characterize that as subsidization of the business that you made less on, but the business that you made less on in your illustration was the home delivery business in comparison to the chain store business; is that correct?

A Yes. I can relate that to retail business, is affected by areas, different market conditions, and you can take some areas in the City of Chicago, and the retail business today is profitable because they can get a, the margin needed to give the retail customer the service.

Now, if you get out in some lower income area, and where there are many stores or gasoine stations, the retail business is a little harder, and because certainly, if someone opens up a 40,000 foot chain store, no one is going to buy any retail milk within four or five blocks, or ten blocks of that store; they will walk over and get it, but when you get into areas like downtown Chicago, and apartments, and where service is the thing as far as what is involved in retail, people want that service. They are willing to pay for the service, and retail business can be profitable.

Q But as a general matter, you found it better to get out of the retail business entirely?

A Yes. That -- that is due to the difficulty of distribution, and also of handling the retail drivers and so forth; it seems like distributors, we, we sold our retail routes to distributors, and they, in turn, sold the milk. They would operate more efficiently than we could.

Q I believe in response to a question from Mr. Mathias, and I think it's highly relevant to the direct examination.

JUDGE HINKES: Yes, I think wholesale prices would have encompassed discounting that took place to the stores, and I'd have to allow that.

MR. MATHIAS: All right, your Honor.

By Mr. McInerney:

Q I think the witness has already answered the question that there was a trend, and my pending question was what was the trend?

A Well, there was additional incentives beyond the regular discount, such as promotional allowances on by-products. To my knowledge, there was no major dairies had a promotional allowance on milk. It was on by-products such as cottage cheese, sour cream, chocolate milk, and buttermilk, and those items, of 5 cents for promoting that particular item.

And then, of course, we -- most of the major dairies would have approved of advertising. In other words, if they would advertise a half gallon of buttermilk in the newspaper, why, the proof, they would submit that avertising to the dairy and they would allow them what the ad -- of course, they had to run your name with it, like it would be 'Wanzer buttermilk -- and then we would allow them at the rate of their lrhl

Q And did Certified also advertise in the Chicago area --

A Yes.

Q -- Country Delight, I mean.

A Extensive on radio.

Q How about Hawthorn-Mellody?

A They had different advertising programs. They were a little different than either one of them that we related. They seemed to like to get into contests.

Q What was the advertising allowance that Wanzer granted on milk and dairy products by retail customers, what did it come to?

A Well, we would -- the industry seems to, overall, it can vary some. Of course, the different operations, but, as a rule, you look at around two mills for your -- two to three mills for your total advertising budget, that is, your contributions to your civic situations and --

JUDGE HINKES: Was that two mills per point?

THE WITNESS: Yes, two to three mills per point.

By Mr. McInerney:

Q I am not sure that I heard the full answer, sir.

I was asking what your advertising allowance would be in terms of -- was there some limit, for example, in terms of a percentage of the cost of the a look at various delivery methods in moving the product from the handler to the retailer or we take a look at retail delivery to home delivery and at the various methods used in home delivery as well.

Q Have you done any research in the areas of dairy marketing or agricultural economics?

A Yes. My Ph.D. thesis at the University of Wisconsin did deal with the Wisconsin dairy trade practice law. We did take alook at various distribution systems, distribution times. I have done some work at Southern Illinois University in the dairy area and also other areas in agricultural economics.

Q Doctor, as an instructor or teacher or professor, is it necessary in the course of your duties to keep abreast of dairy economics and the recent developments therein?

A Yes, it is.

Q Have you ever done any consulting work relating in any way to dairy marketing or agricultural economics?

A I worked for a short period of time with Mid-America Dairy Cooperative in Springfield, Missouri, on a problem dealing with cooperative payments.

Q Doctor, you mentioned earlier that in your course in dairy marketing you do take up various delivery systems. I wonder if you could tell us what the general types of in-store delivery systems are which are generally prevalent in the dairy industry in the United States.

A I would classify the delivery systems into three categories. I would title these one, full service; two, modified drop service; and three, a drop service. Going back and taking a look at each of these full service, modified drop and the drop service, first, the full service, the functions that would be performed in a full service would be securing the order, making up the order, moving the product to the dairy case and/or the dairy cooler, servicing the dairy case, stamping the merchandise, accepting outdated merchandise, making out the bill and collecting by cash, by check or by signature of the invoice.

Q Could you define what modified drop service is for us?

A The second one I mentioned was modified drop. In modified drop we do have pre-ordering of merchandise and no return of outdated merchandise. Billing is by mail. The major functions then consist of making up the order and moving the product or the merchandise into the cooler. There is no servicing of the dairy case.

Q Finally, Doctor, how would you define what you would call drop service?

A In the drop service again, like modified drop, there would be pre-ordering of merchandise, billing by mail. The major function then -- one other thing I should mention is that the merchandise would be pre-stacked or pre-arranged in the truck and the major function then is moving the product from the truck onto the dock of the retail grocery store.

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Q Thank you for your definitions.

Just to make aboslutely sure that we know all of the terms and it is clear for the record, could you tell us, you had given us the term in full service "securing the order." What do you mean by that?

A I mean that the delivery-salesman would go into the retail grocery store and determine the amount of product that would be needed by that store.

Q You had also used the term of "putting up the order" or "making up the order."

A Once a delivery-salesman has secured the order, he knows how much product would be needed by that store. He would have to go back to the truck and select that merchandise. That is what I mean by making up the order on the truck once he knows what the order is.

Q You mentioned the term "servicing the case." What does that consist of?

A Two major functions, first, one rather obvious is placing new merchandise in the case and the second is rotation of the product in the case moving the older product to the front of the case.

Q I think you had also mentioned stamping as a part of full service. Can you tell us what that is?

A In our definition we used stamping as one of the functions performed, that is, marking the retail price on the product.

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Q And accepting outdated merchandise?

A That is accepting merchandise that has exceeded the code date on the product.

Q I think you did define for us sufficiently what collecting is. Can you tell us what pre-ordering is?

A For modified drop and drop service, the basic principle is that the driver does know the amount of merchandise that will be taken by the retail grocery store prior to going to that store.

Q Thank you for those very helpful definitions.

Now, once again, could we go through just quickly to help us understand the definitions of modified drop and drop and what the difference is?

A Between modified drop and drop?

Q Yes.

A The basic difference between modified drop and drop is that with modified drop the product is wheeled into the -- I should say is moved into the cooler; drop service, the product is left on the dock of the retail grocery store. The driver would not even enter the retail grocery store.

Q What is the relationship of these various delivery systems you have defined to in-store delivery from the wholesaler to the retailer?

A We should expect because there is less time, I am sorry, there is less functions being performed in drop service than in modified drop service, that there would be less time required for drop service than for modified drop service. Likewise, we should expect since there are less functions performed in modified drop service than full service, we should expect it would take less time to make the delivery. I guess you could extend this one step further and come to the conclusion that it would require less time for drop service than for full service.

Q Then as I understand reduced services results in reduced time.

A Exactly.

Q Doctor, in addition to the method of reduced services as a factor or method in reducing delivery time, is there any other method or factor which has a relationship to reducing delivery time?

A Another factor that would result in less delivery time per unit would be a larger quantity taken per delivery. In other words, we should expect that as quantity taken per delivery or per stop increases that delivery time requirements per unit would decrease.

Q As a method or factor in reducing delivery time, which is more important, the taking of greater quantities or volume or reduced services, in your opinion?

A In my opinion, the greatest time savings would be taking larger quantities per delivery or per stop.

Q Doctor, in giving us that very helpful explanation, you mentioned the term "unit." Could you define for us in a general sense what you mean by the term "unit" as you are using it here?

A We are using a standardized unit. Our definition of one unit would be one quart as the basic standard.

Q One quart of milk?

A That is one quart of milk, right.

MR. SOEFFING: Please mark for identification Commission Exhibit 181-B which is a document entitled at the top "Figure 2, Time Requirements Per Unit for Full Service and Modified Drop Service-Wholesale Milk Delivery." On one side is the statement, "Delivery Time Per Unit," in minutes and at the bottom, "Number of Units Per Delivery."

I hand you Commission Exhibit for identification 181-B and ask you to familiarize yourself with that document.

MR. FALLS: Is that the document you furnished to us previously?

MR. MATHIAS: Yes, it is.

MR. FALLS: May I check and see if I have the right one? Thank you.

MR. SOEFFING: Your Honor, some of this has been unfortunately cut off by the Xerox machine, but I think it will serve the purpose as an illustration.

(The document referred to was marked Commission Exhibit 181-B for identification.)

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is a narrowing of the difference in time between full service and modified drop service as the deliveries become larger.

Q When you say in time, do you mean in time per unit?

A Right. I should mention again that on the vertical axis, we have delivery time per unit in minutes. On the horizontal axis we have the number of units per delivery.

Q Therefore, as I understand what you are saying, as volume goes up, delivery time savings per unit between modified drop and full service decreases; correct?

A Right.

Q Would that same pattern as you have illustrated for us on this graph hold true between, let's say, full service and modified service and modified drop service and drop service, as a general pattern?

A Yes. If we put in the time requirements for full service and drop service, that is, if you took a look at drop service to begin with, you would find that the time requirements drop substantially in the low volume areas and then the curve would tend to flatten out. If we compared drop service and modified drop service, we would see that the difference in time requirements between drop service and modified drop service would tend to narrow as quantity taken per delivery increased.

We would have the same pattern if we compared drop service with full service, right.

Q What explanation and what reasons can you give us for this result?

A There appear to be two reasons for the narrowing of the differential in per unit time requirements between full service and modified drop service. The first reason is that if we take a look at the elements that go into full service delivery, note that a large part of these elements are made up of what I would call fixed time, that is, securing the order, to a certain extent making up the order, to a certain extent stamping the merchandise, the collection procedure. I would classify this as fixed time, that is, time that does not change as the number of units taken changes.

Therefore, as we get into the larger quantities this fixed time, this uniform time is spread over more, a larger number of units. That is the first reason.

A second reason that I have observed is that as you do get into the larger deliveries, that is, the larger number of units taken per delivery, that full service at some point tends to come fairly close to a modified drop service. That is as you get into larger deliveries, what happens to the extra product, it does not end up in the dairy case. It ends up in the cooler which was my definition of modified drop service.

So again, in review, I have mentioned two reasons a large number of fixed time for full service in relation to modified drop and secondly, when you get into the large deliveries that full service does tend to resemble modified drop service.

MR. FALLS: Your Honor, this testimony and exhibit obviously depend on a lot of backup data. I don't want to interrupt the testimony by asking for voir dire and I would be quite willing to go ahead as it is if I can have it done subject to the possibility of a motion to strike after all the testimony and cross examination is finished, if there turns out to be an insufficient basis for the testimony.

JUDGE HINKES: Certainly.

By Mr. Soeffing:

Q Doctor, in referring to this exhibit, you have explained certain things to us and the general pattern which it shows. From your experiences, would this situation hold true for Chicago as well as for the other market areas in which such patterns have been shown to exist?

A I would expect that it would hold true for a large number of geographical areas because what I am showing here is time requirements for in-store delivery. I would expect that, well, full service in Los Angeles, for example, would be the same as full service in Chicago. Full service in Chicago would be the same as full service in Milwaukee, et cetera.

So, we are considering a defined, service defined, function that will be performed. We are using a standardized unit. We are using a quart as an unit. I would expect that it would hold true for a large number of geographical areas.

Q And in particular, the pattern would hold true for Chicago in your opinion?

MR. FALLS: I object to that. I think the witness answered the question.

JUDGE HINKES: I will sustain the objection.

By Mr. Soeffing:

Q Dr. Solverson, I hand you Commission Exhibit 75A through J which has been introduced into evidence. Have you familiarized yourself with this document, Dr. Solverson?

A Yes, sir.

Q Doctor, have you inspected Commission Exhibit 75?

A Yes, I have.

Q Have you read a copy of the testimony of Mr. John Szczepaniak?

A Yes, I have.

Q And looking at Commission Exhibit 75, how would you categorize these terms of service which were given to A&P considering your definitions of the different types of delivery service?

A In my opinion, this Exhibit 75 would define the modified drop service.

Q In other words, it would resemble modified drop or would be modified drop?

A It would be, in my opinion, a modified drop service.

Q Did you listen to Mr. Szczepaniak's testimony and read his testimony later?

A Yes, I was here. I listened to his testimony and later read his testimony, yes.

Q Considering the testimony he gave regarding service to A&P stores, how would you characterize this service?

A This is to the A&P stores?

Q That is correct.

A Again, in my opinion, the testimony of Mr. Szczepaniak would indicate that the A&P stores were receiving a modified drop service.

JUDGE HINKES: Dr. Solverson, remembering the difference between the modified drop and the drop service, it was the delivery to the dock, right?

THE WITNESS: Right.

JUDGE HINKES: On 75A delivery apparently may be made to the dock. Isn't that true, Doctor?

THE WITNESS: Yes. It is.

JUDGE HINKES: Wouldn't that make it a drop delivery rather than modified drop?

THE WITNESS: Yes. If on page 1 -- I have a hard time keeping track of these numbers -- 75A.5, "Deliveries at the Store Level shall be handled in the following manner:"

If it was only to the receiving door of the store, this would be a drop service. The judgment I used that it did say to a designated place in the receiving platform to a refrigerated storage box, then that is a modified drop. They were offering either B or C and I assumed that they could have C which would be the modified drop, but that is right, if it was only to the receiving door of the store it would be my definition of a drop service.

JUDGE HINKES: So that your answer really is dependent upon whether the option is given to A&P or to Borden as to delivery?

THE WITNESS: Yes. That is the key, whether it went tothe dock or to the storage cooler.

By Mr. Soeffing:

Q Now, Doctor, what is the relationship, if any, in your opinion, between delivery time savings and cost savings, if any?

A I think it is very obvious that there would be a relationship between time and cost. If we take a look at a delivery and if we could reduce the amount of time involved in making that delivery, I think it is very obvious that there would be cost savings involved.

Therefore, we would come to the conclusion that there would be a very good relationship between time and cost. In fact, I think you could say that you could use time as a proxy for cost.

If you take a look at the cost curve and the time curve they do tend to approximate each other.

Q What about a situation where a driver or a delivery man is paid on the basis of a commission?

Q He was with the Trade Practice Division of what?

A Wisconsin Department of Agriculture.

Q How was the objective of the project defined?

A The way we started out on this project is that we would act, Frank Groves and myself, would act as economic advisers in the administration of the Wisconsin dairy trade practice law. The Wisconsin dairy trade practice law contains basically three provisions, one is certain non-fair trade practices such as providing free cases and this type of thing. A second provision was that sales would not be made below cost. This was a problem that thank God I didn't get involved in. It is a very touchy problem. And the third was the price discrimination law.

What we were trying to do in the time study was to come up with certain standards that handlers in the State of Wisconsin could use in determining how much savings ~~and~~ in delivery time were available from larger quantities and different types of services. This was our basic objective, to come up with standard times so the handler could use this in computing his cost. We did not attempt to come up with cost. We attempted to come up with the times and then allow the handler to apply these costs to the standard times.

Q Times he could follow without getting in trouble with the Trade Practice Division through the resulting discounts?

A Yes.

Q What was your purpose in separately recording the time spent on the individual functions performed in the store?

A I think the basic purpose was, we did review some other time studies that had been done. This was the method they used. That is probably not a very good reason, but there were some other studies we reviewed and we tried to break it down into finer detail. I am not so sure we needed it in the end. I think this was the major purpose.

Q You are aware that in some time studies of this sort they attempt to develop standards to determine the time allocable to a particular stop. You didn't do that.

A We tried this. This was very difficult to do. Once you start eliminating various functions you do find out that one function tends to compliment the other function and therefore you might run into different time standards for securing an order and making up the order if one of the other functions is missing in that delivery.

For that reason, we did not try to make up time standards for given functions.

Q How did you go about classifying the various delivery stops as between or as among full service, modified drop service and drop service?

A Based on the definitions of full service, modified drop and drop service.

Q Did you do it by actually visiting the store and watching what happened and then classifying or did you ask the handler what kind of service was performed or did you do it by looking at the contracts or what?

A On the form again we were timing the functions. So it was very easy. We had a time for a given function and that function must have been performed. So we determined ourselves if that stop was a full service, if it was a drop service or modified drop service. It was determined by us, not by the handler.

Q On the basis to what the form showed as to what services had been performed?

A Yes.

Q What did you do when the services performed included some but not all of the services that make up your definition of full service?

A We did find that most of the stops fit in quite well in our definitions, full service, modified drop and drop. I should have mentioned this when we were talking about the number of observations, that there were some observations that we eliminated because of this. There is also the possibility that we eliminated some observations because it appeared that we were not getting a good reading on the delivery.

Q Why would you not get a good reading on the delivery?

A As an example, there was one route I road with the delivery man and he did have some physical problems. He had a bad

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leg. I believe he thought that I was a representative of the company checking up to see how fast he would move. He was moving much faster than anybody else.

Q Did the faster movement outweigh the infirmity or not?

A I think it did. So we eliminated something like that.

Q Do you know roughly how many observations you eliminated because they did not fit into your definitions of the various types of service?

A Again, I would have to check. It wouldn't be too many that didn't fit into these various types of services.

Q If you will turn again to A&P Exhibit for identification 9, and particularly pages 2 and 3, there is a definition there of the three kinds of service to which you have previously referred.

A Yes.

Q Would you regard those definitions as being in accordance with your testimony today?

A Could I just read them?

Q Surely.

A There is one discrepancy on the drop service. I did define drop service as being put on the dock of the retail grocery store. I would have to check on this, but I am fairly confident that the time study we did for Special Bulletin 73, the product was put on the dock rather than in the back room in the store.

Q You are referring to the fact that in the definition as it appears in the Bulletin, it says under drop service the product is prearranged in the ~~structure of~~ truck for each store and the product is put in the dock or back room of the store.

A Yes, right.

Q You are not sure whether in doing your time studies and classifying the stops for purposes of those time studies whether you applied that definition or not?

A I am fairly confident that the product was put on the dock of the retail grocery store.

Q Invariably?

A Right.

Q Is there any way of checking that?

A This should be reflected in our time sheets, yes. But we would have to go back to the original time sheets to check this out.

Q In other words, you say that this Bulletin is just plain wrong where it suggests that in some instances under drop service the product was delivered to the back room of the store?

A I wouldn't say the Bulletin is wrong.

MR. SOEFFING: I am going to object to that, your Honor.

MR. FALLS: I think it is a fair question.

JUDGE HINKES: The witness will answer, if he can.

A I didn't check your figures, but that is somewhere in between, right.

Q So the time required for modified drop service is nearly twice as much for delivery in that bracket as it is for drop service?

A Yes.

Q Having in mind a difference that substantial, can you point to the elements of the modified drop service that consume that additional time over drop service? Where do we find that time?

A There are two differences between the modified drop and drop service. Modified drop, moving the product into the cooler, now that might sound relatively minor comparing the cooler with the dock, but most of these routes we rode this very convenient method of delivery, moving the product from a truck onto the dock which is quite level with the truck, in most cases, so it is quite easy to move the product from the truck onto the dock. A dolly could be used quite easily.

So it is a very fast method of moving the product from the truck to the dock, compared to the moving of the product into the storage ~~quarter~~ cooler.

The second difference is in the prearranging of the product. For modified drop the product was not prearranged, even though there was preordering. It just seemed impossible to rearrange this product since the trucks we were riding were

A I worked on it. I think a large part of cost accounting is involved in good reasonable allocation of cost. A lot of it is knowledge of the area that you are doing the work in. So I did work with them, but the expertise came from the accountants.

Q This thesis rests quite heavily, does it not, on time study information?

A The thesis itself?

Q Yes.

A No.

Q What about the appendix, the appendix sets forth a considerable amount of cost study information, right?

A Yes. The way the thesis ended up, the thesis was mainly a case study of the trade practice cases in Wisconsin. That is the way the thesis was. We put the time study in the appendix as an addition that we thought might be useful.

But the main part of the thesis was a case study of the trade practice cases in Wisconsin.

Q What I am really getting down to is the time study information in the thesis essentially the same time study information in your Table 1 which has been marked as A&P Exhibit 8 and for the Bulletin which has been marked as A&P Exhibit 9.

A There are some differences in the times, as you will probably note in the thesis and in the exhibit and in the Special Bulletin 83. We did add some additional stops, or I added some additional stops for my thesis. The thesis was completed later then was Special Bulletin 83. So there are some differences in the standard times as developed in the thesis as compared to Special Bulletin 83, yes.

Q Was your thesis prepared before or after you prepared your testimony in this case?

A Before.

Q So if I understand you, the tables which appeared in the appendix to the thesis have some data that was not in the earlier Bulletin?

A Yes.

Q Was that data that was accumulated after the time of publication of the earlier Bulletin?

A Yes, it was. In my thesis I added a time study that had been done by a firm in Wisconsin. It was not done by the Wisconsin Department of Agriculture or the University of Wisconsin.

Q And you combined all of that data to come up with the tables which appear in the appendix to your thesis?

A Yes. I have not checked this over recently, but there are some differences in the standard times, yes.

MR. FALLS: I would like to now have marked as A&P Exhibit 12 another summary sheet which I have prepared.

(The document referred to as Respondent A&P Exhibit 12 was marked for identification.)

MR. SOEFFING: Your Honor, it will be hard for us to object to something that may be irrelevant or objectionable if we don't know what is going to come about. May we have a few moment to help us familiarize ourselves with it?

MR. FALLS: May I discuss it off the record.

(Discussion off the record.)

JUDGE HINKES: On the record.

By Mr. Falls.

Q Dr. Solverson, this document, A&P Exhibit 12 for identification reports to summarize and compare certain information taken respectively from the table that you prepared and which has been marked as A&P Exhibit 8 for identification and Tables 1 and 2 appearing in the appendix to your thesis.

Does it accurately reflect those figures?

A I am sorry, I didn't check it with this. What page is that on again?

Q 203 and 204.

A Yes.

Q Now let me go back a minute to Government's Exhibit 181B, that is the curves that you drew.

A Right.

Q Which data was that based on? Was that based on the data which appears in the brochure which is A&P Exhibit 9 for identification or in your thesis?

A It is based on the Bulletin, allocation of wholesale milk distribution costs.

Q So it does notinclude the complete or fuller information in your thesis?

A Could I make a statement on that?

As I think I stated, the data reported in the thesis represents the time studies that were done by the University of Wisconsin, myself, and the Wisconsin Department of Agriculture. Also in the thesis I included data that we had from another handler, from a handler. It was not time data that we collected at the University of Wisconsin or the Wisconsin Department of Agriculture.

I did, however, include that in the thesis. It is not footnoted. I don't think it is included in there. I would have to read it over to be sure. The problem that I ran into in including that data was trying to match up our definition of full service, our definition of modified drop with their time studies where they were using a different form in collecting the data.

I expect that is where the difference in time does come in.

If I recall right, one of the major problems we had was in the area of modified drop. I note from your exhibit that the modified drop time is considerable less in some of the brackets than in the Special Bulletin 83. We had trouble matching up their drop ~~of~~ or what they called restricted service, with our modified drop. This is where we ran into the problem.

The basic difference between Special Bulletin 83 and the thesis is in the thesis we did add the times of an independent handler.

Q But you did put it in the thesis.

A I did put it in the thesis, that is right.

Q Is it not the fact, Dr. Solverson, that the numbers that appear in your thesis for full service delivery in every instance show more time for full service than was reflected in your Table 1 which has been marked as A&P Exhibit 8 for identification?

A Yes.

Q Is it not also the fact that the times shown in the information in your thesis for modified drop service are in every instance less than the times shown in Table 1 which has been marked as A&P Exhibit 8 for identification?

A Yes.

Q So that if one were to use the information in the thesis instead of the information in Table 1, you would come up with a larger difference in time between full service and modified drop service?

A Yes.

JUDGE HINKES: Is there any explanation of why the figures are higher in the thesis than they are in Exhibit 8?

THE WITNESS: For full service?

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JUDGE HINKES: Yes.

THE WITNESS: Again we had a hard time matching up definitions the time reporting form we used with the time reporting form they used. We don't know exactly. We got a fairly good idea of what services they were offering, but we didn't know exactly what services were being offered. I think the data --

JUDGE HINKES: Are you saying that the full service of one is not necessarily comparable to the full service of the other?

THE WITNESS: Yes, the full service as defined by this handler that we got data from was apparently different. We didn't have the full information from the full service as we defined it at the Wisconsin Department of Agriculture.

By Mr. Falls:

Q Do you remember what those differences and definitions were?

A No, I don't. The problem we ran into was that the form used by this handler in collecting this time data was in very much less detail than our forms. It had total, if I recall right, total time involved in making a given delivery. They classified it "full service," "drop service," I believe there was a third classification. But it was defined according to their definition without specifying what function was performed.

Q Who actually did this time study?

A Sealtest in Milwaukee.

Q Was it an in-house study or did they have it done by some outside firm?

A If I recall right, it was an in-house study.

Q Apart from what you are able to gleen in the time studies, did the information come to you in some form which enabled you to see how they had defined full service and modified drop service in taking the study?

A Yes, it did. Well, I will change that. We talked to them about what services were being performed. They described the services that were being performed for the three categories they had, full and modified, I don't think they called them this, but we thought they might correspond quite closely with our data.

Q In the course of the information they conveyed to you, did they describe any differences in the services rendered to full service customers in the area they studied as against those you studied?

A I have a hard time recalling this, but I don't recall any differences in the full service. I do recall some differences in the modified drop service. They did have some cases where they were dropping the product in the back room rather than in the storage cooler or they were dropping it in some cases on the dock.

There seemed to be some variability in their definition of the modified drop. But it is here that their modified drop might be less of a service than our modified drop as we defined it, moving it into a cooler or in some cases the back room or in some cases leaving it on the dock.

JUDGE HINKES: We were speaking about the full service, not modified drop. I asked you for an explanation of the difference in times. You said the comparison of services was not necessarily identical. Now if I understand your testimony, they were similar. Which way is it?

THE WITNESS: I don't recall a difference in service between this handler and our definition of full service.

JUDGE HINKES: Then how do you account for the difference [illegible] time?

THE WITNESS: About all I could say is that we did interject another set of data in the thesis. It did change the system.

By Mr. Falls:

Q Did the thesis data --

A By the way, it was not data that was collected by us. It was this independent handler data.

Q In compiling the thesis data, did you add anything ~~that~~ to what you had before other than the data from this individual handler?

A No, I did not.

Q Now in the thesis description it says source time studies

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conducted by the Wisconsin Department of Agriculture and the agricultural studies of the University of Wisconsin, 1963 to 1965. In your booklet, Allocation of Wholesale Milk Distribution Costs, you refer to time studies conducted by the Wisconsin State Department of Agriculture, Department of Agricultural Economics, University of Wisconsin and cooperating dairies during 1963.

Now that carries, it seems to me, a suggestion that there was one set of data that covered a different time period.

A The major time period was in 1963. The thesis states 1963 to 1965. I should have added in the thesis this was not caught, that we did use as data from that other firm which was at a later date so it included it, it was in 1965, I believe that we picked the data up from the independent handler.

Q But there was no data from the Wisconsin State Department of Agriculture from any later time?

A No, there was not.

MR. FALLS: I would like to now mark as A&P Exhibit 13 for identification another summary sheet which I have prepared. Inview of your Honor's ruling, this exhibit also refers to the 60 cents and the hypothetical allocation. In accordance with your Honor's ruling I will strike that portion out and not ask the witness about it.

JUDGE HINKES: Very well.

(The document referred to as Respondent A&P Exhibit 13 was marked for identification.)

By Mr. Falls:

Q Dr. Solverson, again this purports to show first the time required for full service delivery as taken from your Table 1 which has been marked as A&P Exhibit 8. It has used the time for drop service which is reflected both in your thesis and in the allocation of wholesale milk distribution costs bulletin and I think there appear the same numbers in both places.

Can you verify the correctness of those numbers?

A Yes.

Q Taking those sets of data, the consequence is that the difference between the time required for full service and the time required for modified drop service -- let me ask you to correct the exhibit. Under 3 it should say "time required for drop service," not "modified drop service." Does that then give, Dr. Solverson, a difference of time for the delivery of the 501 to 600 bracket of 36.14 minutes?

MR. SOEFFING: I will object. I think he has already testified that he used different data in the thesis from that which he used to prepare the data for us. I think he explained he injected certain data that they didn't have.

By Mr. Falls:

Q Just to clear that up. It is true, is it not, that there is no difference between the drop service data at least in this bracket as between the brochure which was prepared in 1964 and the thesis which was prepared later?

A Right.

Q So we are dealing with the same data?

A Right.

Q I am not sure we had an answer to the last question which was whether the difference in minutes per delivery in the 501 to 600 bracket between full service and drop service, using these data, is 36.14 minutes.

A I am having a little problem here with all these papers. Where did the 57.52 number come from?

Q That figure is in your Table 1.

A Yes, I have that table.

Q What is the answer. Was the answer yes?

A Yes.

Q That worked out to a difference per unit of .066?

A Yes.

MR. FALLS: Your Honor, I wonder if we might take a five minute recess. I am trying to decide which exhibits to use and I think I might expedite that with a few minutes.

JUDGE HINKES: Very well.

We will take a short recess.

(A brief recess was taken.)

JUDGE HINKES: On the record.

MR. FALLS: We made use of the recess, your Honor, to let the witness and the government have a preview of a couple of exhibits.

JUDGE HINKES: Very good.

MR. FALLS: Now I would like to have marked as A&P Exhibit --

THE WITNESS: I was just going through this comparing Special Bulletin 83 with my thesis and it has been sometime ago that I wrote the thesis. I was just trying to recall where the inconsistencies were between Special Bulletin 83 and the thesis.

The point that I do remember, where we are getting some of the variation, especially in modified drop, is that the time data that we got from this independent handler was divided into two different categories. One was full service. The other was a restricted service.

So there were only two categories. So the changes that were made from the Special Bulletin 83 to the thesis are in full service and modified drop service. I checked this over in the drop service in Special Bulletin 83 time requirements and in the thesis should be the same. I think we went through that.

So to explain the differences in times for the modified drop, there appeared that there was a large amount of variation in how they defined this restricted service, some of it moving into the back of the store, some of it moving onto the dock, in fact, some of it moving into the cooler. So there was quite a variation there. It was my decision to throw it into modified drop.

I expect that there might have been some drop service involved in that actually. It apparently covered quite a wide variety of functions performed by that independent handler.

I still have no explanation for change in full service.

JUDGE HINKES: Looking at the modified drop, and this is the A&P Exhibit 12, how would that affect the figures that you show for modified drop service delivery then? The left side columns are your figures that you gave us today?

THE WITNESS: Right. This was based on Special Bulletin 83.

JUDGE HINKES: The left side, you mean?

THE WITNESS: Yes.

JUDGE HINKES: And the right side is your thesis?

THE WITNESS: Yes.

JUDGE HINKES: If I understand your testimony, the difference shown between these two sets of figures is based upon your decision to consider the information that you got to be properly allocable to modified drop service delivery?

THE WITNESS: Yes. There was some decision that had to be made there, would I use it in my thesis or would I not.

I decided to use it in my thesis. Apparently there was considerable amount of variation in this data because of their definition of a restricted service.

JUDGE HINKES: I see. Very well.

By Mr. Falls:

Q We still are clear, are we not, that you do not recall there was any difference in the definitions between full service?

A No, I cannot explain the differences in full service.

MR. FALLS: I would like to have marked as Exhibit 14 another of these tables that I have prepared, summary tables.

(The document referred to as Respondent A&P Exhibit 14 was marked for identification.)

XX By Mr. Falls:

Q Look at A&P Exhibit 14 for identification, Dr. Solverson, does the first entry properly reflect the minutes required for full service delivery in the 501 to 600 quantity bracket as taken from your Table 1 which has been marked as A&P Exhibit 8 for identification?

A Yes.

Q And the 36 minutes properly reflects the time for a modified drop service delivery using the data from your thesis?

A Yes, I checked this once before. You did use some average here, I take it.

Q No, that is not an average. That is appendix Table 2, page 204.

A Are we talking about Exhibit 15 now?

Q No, 14.

A Yes.

MR. SOEFFING: Your Honor, I would point out that in 2 it says 501 to 600 whereas I have on my sheet 500 to 599. Am I correct, Mr. Falls?

MR. FALLS: Yes, I think in this instance the two tables defined the brackets differently. One defined it as 501 to 600 and the other 500 to 599.

By Mr. Falls:

Q Do you think that would make a significant difference?

A No.

Q So the difference between full service and modified drop service, the difference in time for one delivery to the 501 to 600 bracket or the 500 to 599 brackets, would be 21.52 minutes?

A Right.

Q And the difference between minutes per point would be .039 minutes?

A Right.

MR. SOEFFING: I want to point out that in doing that for the record, Mr. Falls took full service from one table in which there was also certain figures on that for modified service and then he took modified service from another table in which he did not use --- in other words, which is from the cases the driver salesman would pick a case up, or a couple of cartons up and carry it into the store. That is one possibility, of carrying several cartons in, or carrying a case, or a couple of cases in.

Another possibility would have been wheeling product into the store on a dolly.

Another possibility that we saw in drop service where the product was being moved on to the loading dock was sliding the pallet off from the truck on to the loading dock.

Q Certainly in all or most of these modes of delivery there are occasions when the deliverer or the employee is moving a case at a time. Is that right?

A Yes.

Q Lifting the case from the truck on to a dolly, lifting a case from the dolly ~~on to~~ into the cooler. Is that right?

A Yes.

Q With respect to elements of that ~~time~~ kind, would it not make a difference in your cost allocation or your time allocation how many points the case contained?

A Yes, it would.

Q It is true, is it not, that in some instances the case would contain more points and in other instances less points?

A You are talking about a full case?

Q A full case, in the area you studied, did they have any glass containers?

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A There was some, very little.

Q Isn't it a fact that in some instances glass containers and paper containers of the same point value occupy different amounts of space in a case? For example, a case of glass quarts may contain fewer points than a case of paper quarts?

A Yes.

Q In that kind of instance wouldn't it be appropriate to allocate time with respect to some of these elements at least on a case basis rather than as a point basis?

A Yes, that is an alternative. We took a look at the studies that have been done where they have used the case as a standard unit. We tried to come up with a unit value that would represent the amount of labor expended.

Of course, there is going to be some error here. One of them you brought out is the glass versus paper.

Q So if you used the mechanism you used, you don't take account of that particular area?

A Your specific example, glass versus paper, no, we did not.

Q In the course of your studies both in connection with your thesis and in connection generally with the milk and dairy industries, did you find that there was frequent occurrence of non-price competitive practices?

MR. SOEFFING: I will object, Your Honor. That is beyond the scope of the direct examination.

JUDGE HINKES: You may continue, Mr. Mathias.

duty.

Q Did you have any supervisory control over these routes, sir, as route foreman?

A No; there was another foreman above me, the regular wholesale foreman, plus there was a man above him also.

Q Well, were you familiar, in this position, with the various wholesale routes in a general way?

A Yes.

Q And were you familiar with the major customers located on the various wholesale routes served out of the Hammond branch?

A I wasn't at the beginning, but gradually I learned the different routes over a time span or a period of time; by running special deliveries to this one and that one, I would learn where the stores were and everything.

Q Were you familiar with the procedures, the delivery procedures, in effect on these various routes?

A If I was to run a route, I would go with the driver and he would show me where the stores were, what door he would stop at, and who he would see and where he would leave the milk, and so on.

Q Now, as an assistant route foreman, starting in, I believe you said, 1963, what were your duties at this point, sir?

MR. SCHAEFER: Your Honor, if I may interject, I don't think it was 1963 when Mr. Szczepaniak said he started as assistant route foreman. I am not sure about that date. Could we just clarify that again?

JUDGE HINKES: When did you say you started as assistant route foreman?

THE WITNESS: In '63, I became -- they had me quoted as a foreman. However, I was out in the country for a country for a couple of years, learning country routes on the trailers.

By Mr. Mathias:

Q Approximately how long did you serve in this capacity?

A My son was born in August of '65 --

Q And you were --

A Then I came back into Hammond.

Q In approxiamtely August of 1965, you came back into Hammond?

A Right.

Q Starting in August 1965, what was your title at this point, sir?

A They still had me classified as a foreman. I was getting foreman's pay.

Q And what were your duties in that position, sir?

A Like I said, whatever might come along, from moving cabinets and iceboxes or putting up cases or running special deliveries.

Q And did you begin at that time to make deliveries on the various routes in the Hammond area?

A Yes.

Q And approximately how frequently would you have to run routes?

A Most generally it would be during a vacation period. If they didn't have a vacation man handy or a couple of them wanted to go at one time, I would learn the route and run it.

Q Were there any other times when you would have to run the route other than vacations, such as illnesses or absences?

A Sickness.

Q And was it necessary in this regard for you to have a general familiarity with the various routes, wholesale routes, of the Hammond branch?

A That is right.

Q Now, Mr. Szczepaniak, in the period 1965-1966, do you recall that Burger's Market in Hammond, Indiana, was a customer of the Borden Company?

A Yes.

Q And this was served on one of the Hammond branch routes?

A Right.

Q And you were familiar with this stop?

A Yes.

Q Now, in the case of Dick's Market, do you recall this particular store as being a Borden customer during this period of time, 1965-66?

A Yes. They went out of business. I can't remember what year it was they went out is the reason I hesitated.

MR. MATHIAS: I might note for the record that this store ceased operations on January 14, 1967.

By Mr. Mathias:

Q Do you recall, during this period of time, 1965 and 1966, Mr. Szczepaniak, whether Borden served the Model Food Center in Hammond, Indiana?

A Yes. We also lost them. I don't know when it was. I can't quite remember.

Q But you were serving them in this period of time?

A Yes, I believe it was.

Q And were you familiar with this stop, sir?

A Yes.

Q Do you recall a store known as South Town Market in Gary, Indiana, and whether or not this was served by the Hammond branch routes in this period of 1965-1966?

A They also closed up. I don't know when exactly, but I remember it being served on one of our routes.

Q This would be in the middle 1960's, before they closed?

A Yes.

Q Do you recall two Joseph Tittle and Son stores, one in Highland in Hammond, Indiana, and one on Homan Avenue in Hammond, Indiana, as having been served by Borden in the '65-'66 period?

A Yes. The one on Homan closed up also, and I can't quite remember the year there.

MR. MATHIAS: I would like to note for the record, your Honor, that that store ceased operations on April 1, 1967.

MR. SCHAEFER: I would just like to say, your Honor, that I hope the witness is not taking this information to supplement his testimony in some way. The distinction here is clear when Mr. Mathias interjects these dates.

JUDGE HINKES: Well, the witness's statement stands as given, but there is evidence already in this proceeding to the effect as to when these stores ceased doing business, and this recital of Mr. Mathias, of course, is merely a recital of evidence already in. It does not necessarily become part of this witness's testimony.

MR. SCHAEFER: Insofar as it is in the record, I understand that, your Honor, but I hope we keep the distinction here.

JUDGE HINKES: Very well.

MR. MATHIAS: Your Honor, I believe it is quite clear that I am not suggesting any dates to the witness. I have made the statements only after the witness has testified.

By Mr. Mathias:

Q Mr. Szczepaniak, did the Borden Hammond wholesale routes serve two Joe Tittle and Son stores in Gary, Indiana, one on Lake Street and one at Village Court, in this period 1965-66?

A Yes.

Q And did these Borden wholesale routes serve ~~Wally's~~ Wallies Market

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in Hammond, Indiana, during this period 1965-1966?

A They were on one of our routes, yes.

Q And were you familiar with this stop, sir?

A Yes.

Q And, finally, did the wholesale routes out of the Borden Hammond operation serve Wilco Food Center in Gary, Indiana, during this period, 1965-1966?

A Yes.

Q And, Mr. Szczepaniak, were you personally familiar with all of these stops that I have mentioned?

A Over a period of time, I learned them one at a time by special deliveries or by running a route.

Q Now, Mr. Szczepaniak, the routes out of the Hammond area did not serve the Valparaiso area, did they, sir?

A No, sir.

Q Do you know how this area was served, sir?

A I believe they were served by a vendor or something. I don't really know. I am going on hearsay. I don't know.

Q Mr. Szczepaniak, I hand you Commission Exhibit 123 A through C and ask you to familiarize yourself with this document, sir.

JUDGE HINKES: This document has already been received in evidence?

MR. MATHIAS: It has been received in evidence, sir.

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Q (Continuing) Are you familiar with this document, Mr. Szczepaniak?

A No.

Q Are you familiar with the terms of service outlined in that document, sir?

A You mean the delivery setup?

Q Yes.

A The delivery setup I would be familiar with.

Q Does this document describe the terms of service and delivery which were in effect in the Hammond area and Gary area in 1966, sir, and later periods?

A In reference to what, sir?

Q In reference to the general terms of service.

A Deliveries, you mean?

Q Yes, the delivery-service terms that are outlined therein.

A They were served six days a week.

Q Was there any requirement, sir, that they had to be served six days a week?

A Yes.

Q What was this requirement, sir?

A Our union contract, sir, requires six-day delivery.

Q So that you were not able to give any lesser-number-days delivery to any particular customer?

A No less than four, the contract stated.

Q And what is the six-day week, then? What was the requirement in this regard?

A Six days delivery -- six days a week.

Q Were all of the large supermarket chains served six days a week?

A All stops was.

MR. SCHAEFER: Can we have a time period on that again, your Honor?

MR. MATHIAS: I used the term "1966."

By Mr. Mathias:

Q This answer would have pertained to the time period 1966. Would this condition have continued following the year 1966?

A Yes.

MR. DEMBROW: Excuse me. What condition are we talking about?

MR. MATHIAS: The six-day delivery.

MR. DEMBROW: Thank you.

By Mr. Mathias:

Q The six-day delivery requirement continued after 1966?

A Yes.

Q And was it also in effect in 1965, sir?

A I am sure it was. The best I can remember, we always delivered six days a week -- the routes went out.

Q Now, was there any time in later years when this circumstance changed, when delivery was made on a less-than-six-day-per-week basis?

A Not that I delivered.

JUDGE HINKES: Let me understand. You say that this was a six-day delivery program but that the union contract only provided not fewer than four?

THE WITNESS: Six days, no less than four.

JUDGE HINKES: So, if I understand it, the union contract would permit as few as four-day delivery program but the practice was a six-day, is that it?

THE WITNESS: Right, sir. They all had six-day delivery.

JUDGE HINKES: Very well.

By Mr. Mathias:

Q Now, in connection with sales to the supermarkets, both chain and independent, how were deliveries at the store level generally handled?

MR. DEMBROW: Excuse me. Are we talking about all supermarkets?

MR. MATHIAS: Your Honor, I would prefer my question to be answered. I would rather not be interrupted by A and P counsel.

JUDGE HINKES: Yes; I don't think we should engage in these questions between counsel. If there is an objection, state it in the acceptable form and I will rule, but otherwise let us have the question and go on. You will have your opportunity to explore the matter further to your heart's content on cross-examination.

MR. MATHIAS: Would the reporter read the question.

(The reporter read the pending question.)

THE WITNESS: What do you mean -- "how were they handled"?

By Mr. Mathias:

Q How was the delivery made in general?

A Well, to the cooler.

Q And this would be true in the case of delivery to an A and P store?

A Right.

Q Would it be true in the case of Burger's Market?

A Right.

Q Would it have been true in the case of the Joseph Tittle and Son stores?

A Right, sir.

Q Would it have been true in the case of Model Food Center?

A Right.

Q Would it have been true in the case of Wilco Food Center?

A Yes.

Q Would this have been true in the case of ~~Wally's~~ Wallies Market?

A Yes.

Q And would it have been true in the case of South Town Market?

A No; South Town, we used to service the case.

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Q What do you mean by "service the case"?

A They had no backup facilities other than maybe one or two extra cases of milk, so, consequently, what milk we brought in, we could bring in no more than what would fit in the case, and the driver would do this.

Q And this was a different service than you performed for the other customers I mentioned?

A Yes.

Q What about Dick's Market? Did you deliver to a cooler there?

A The case there was also serviced by the driver. He had a little more backup room, so we left a little extra in there, too.

Q So in the case of Dick's Market and South Town, an extra service was performed that was not performed for the others?

A Yes.

Q Now, did the Borden Company, during this period, 1966 and following, have a policy concerning preordering of products and advance orders?

A The A and P used to give us advance orders.

Q Did any of the other markets which I have mentioned provide you with advance orders, sir?

A No, sir.

Q During this period, 1966 and following, did the Borden routes in the Hammond area have any provision concerning the return of products?

A The only products that we were allowed to pick up were damaged merchandise and sour merchandise in date.

Q What do you mean by "in date," Mr. Szczepaniak?

A Where the date has not yet expired.

Q This would be the normal shelf life of the products?

A Right.

Q So that if the product were spoiled before the time when it was scheduled, the lowest shelf life, well, then you would take the return?

A Send it to the lab for analysis.

Q Now, was this policy in effect for all of the customers we have named previously?

A Yes.

Q Do you recall a time when the Borden routes would accept returns on any products?

A They might have done this years ago prior to my getting involved with it, but I personally have no knowledge of it.

Q So all the time that you were associated with the wholesale routes in the Hammond area, the policy on returns which you have described was in effect?

A As far as I personally can tell you what I personally had been involved with, yes.

Q And was this the Borden Company policy?

A Except damaged merchandise and merchandise bad in date.

Q So that, in taking this position, you were following the orders of your superiors in the Borden Company?

A That is what way it was told to me to do.

Q Now, Mr. Szczepaniak, you mentioned, I believe, that at some times you drove the routes for special deliveries, is that correct, sir?

A Right.

Q Now, in the year 1966 and following, did Borden's Hammond branch have any policy concerning the frequency and necessity for special deliveries?

A Frequency or necessity?

Q Were special deliveries made as a general rule?

A If a store called up and they needed extra milk and we had it, I would take it to them.

Q Was this a very common occurrence, Mr. Szczepaniak?

A Nothing of any regular nature. You never knew.

Q In the case of the scheduling of your route, was the route arranged so that the stops at the various stores would be made at the time most convenient to the Borden driver?

A The drivers set up their stops by their areas that they serve. We had one route in the Hammond, East Chicago area, and we had another one in the Gary area in the south and another one east of that. The drivers scheduled the stops the most efficient way possible for themselves so they wouldn't be back-tracking and this and that.

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Q Mr. Szczepaniak, during the period 1965 and 1966, what was the method of payment of the drivers in the Hammond branch area? Were they paid on an hourly-wage or commission basis or just what was the method of payment?

A Weekly rate plus commission.

Q And what portion of their pay would the commission be, approximately?

A Depending on the number of points they run through the month.

Q The commission would vary in accordance with the number of --

A Sales.

Q Would the commission be a major portion of their salary in most instances, Mr. Szczepaniak?

A The bigger routes would receive more than the smaller routes.

MR. MATHIAS: Your Honor, I have only a couple of more questions of this witness. Then I would like to try to identify a few exhibits through him, and I think if we would take a brief recess at this point where we could line those up, it would expedite things.

JUDGE HINKES: Very well. We will take a short recess at this time.

(A short recess was taken.)

JUDGE HINKES: You may continue, Mr. Mathias.

By Mr. Mathias:

Q Mr. Szczepaniak, you mentioned that in the case of the A&P stores there was a pre-ordering of the product. In the case of the other stores such as Burger and Title stores, how was the ordering handled in those cases?

A By the driver himself. He had what we would call a buildup of each product in his book, a daily buildup and he would build the product up through that.

Q In other words, he knew the approximate level that each ---

A Of sales.

Q Of sales that each store required?

A Right.

Q And how would he determine then how much was needed in a particular store?

A By the buildup in his book from prior deliveries.

Q He would check to see what was on hand, check against his book and what difference was required?

A Right.

Q Now there was also a mention of some discussion of special deliveries. Did A&P stores in the Hammond area ever get special deliveries after the private label program went into effect?

A Yes.

Q Now in the case of the Joseph Title and Son Stores and Burgers,Model Food Center and Wilco Food Center and Wallis with which you were associated?

A It went west to the line, say, possibly 50 miles east of the Mississippi, 50 miles east of the Rock Island-Quad City area. It started on the western boundry. It would be approximately 50 miles east, because Rock Island covered that area.

Q You did not go into Iowa?

A No, I did not, but as far as Iowa was concerned, I did handle anything for A & P that went into Iowa, but it was not normally part of the Chicago branch you are speaking about. It went south almost to Peoria, but not into Peoria. It went west as far as Southbend.

Q Don't you mean east?

A Yes, I am sorry, northeast and north to the Wisconsin line.

Q This was the area within which you are primary concern was directed?

What position did Joseph Malone have in either of these units?

A Joseph Malone was with the division, the Central Division, and I think he was a Vice President of the Central Division. He was capable on all the rules and the market orders and acted as a guide for many operations that we were involved in.

Q Mr. Tarr, as Chain Store Sales Manager -- is that the title you used for yourself? I don't want to confuse the record. Was it Chain Store Sales Manager?

A That was the title I was given. My card showed Sales Manager, Special Accounts.

Q In this position, what were your duties, sir?

A I called on chain store headquarters. I had a few men in the field who worked with individual stores at openings, and it entailed anything in connection with the sales to A & P and to Kroger and to Eagle and any other Corporate chain organization.

I think those were the only ones, at that particular time, to whom we were selling. Anything that occurred with First National, it was my job to go over there.

Q You would contact the large corporate chains, even though you were not selling to them?

A On occasion, yes.

Q What part of your duties accounted for the greatest portion of your time?

A Since A & P was our big account, I spent far more time with A & P than I did with anything else. In fact, the greater part, sometimes and during this period under discussion, I think I spent almost the bulk of my time, perhaps 80 percent of my time was spent with them.

Q This was 1964 and 1965?

A Yes, sir.

Q You mentioned A & P, Kroger and Eagle. Were these the only corporate chains to which you were selling in this period that they were coming up with.

Q You mentioned Mr. Schmidt.

A That is right.

Q What did you do this time? What happened next?

A At that particular time, I mentioned to our management people what had occurred, but nothing was done about it, and nothing was asked for, and it was just a way of talking, that sometime they might be interested. They didn't know when, and I did not pursue it.

Q Did you have any internal discussions with management concerning the possibility, at that time, of supplying A & P?

A I told them about it. There was no real discussion, just the fact that it had been brought up.

Q When you refer to the management people, who would this include, sir?

A It would include Mr. Minkler, possibly Mr. Fagerson, sometimes Mr. Reddon, but largely Divisional people.

Q What about Mr. Malone?

A And Mr. Malone and Orville Gose at a later date, but I did not bother Orville very much on that. I forget when he came into the picture.

Q What was the next event in the dealings between Borden and A & P concerning private label?

A Some time in January, Elmer Schmidt asked us to start thinking about giving him a quote on private label items for

Chicago and the Chicago branch of the A & P Tea Company.

Q Was this a request made to you, Mr. Tarr?

A Yes, sir.

Q How was this made? Did he come to you?

A I was over one time. I was over there once a week, and sometimes two or three times, depending on whether I had a particular problem to take up. In the course of being over there, I was there at the time. I did not go over there especially for that, and he told me to start thinking about it and start preparing something.

Q What did you do then?

A I reported back to our management people.

Q Was this your usual procedure in this type of case?

A In anything that involved anything unusual, I always reported it promptly.

Q To your management people?

A Yes, to our management people.

Q What occurred next, Mr. Tarr?

A I think in between there, Elmer Schmidt somewhat pushed us a little bit. He thought we were too slow in getting that thing, that is, getting the quote, but we did come up with a quote on February 9. I brought that over to Elmer and discussed it with him. That quote was on the Chicago area, Chicago and suburbs and the Calumet area of Indiana, which was all under the Federal Marketing Order in Chicago.

It was what we called area No. 1. It comprised 70 percent of all the business that we did with A & P, all the milk business that we did with A & P.

Q Would the Calumet area, include Gary, Hammond, East Chicago?

A That is right. That was all part of that Federal Marketing Order.

Q Did you assist in the preparation of the price quotation that was made to A & P in February?

A I did not.

Q But you did deliver it to A & P?

A That is correct.

Q Who was present when you delivered it?

A So far as I know, just Mr. Schmidt.

Q Did anyone else accompany you from the Borden Company?

A I don't think so.

MR. MATHIAS: Your Honor, I want to show the witness an exhibit in evidence. We do not have all of the exhibits back yet from the marking procedure. I do have a copy of CX-14-A-E. I wonder if Respondents have any objection to my showing him a copy of this exhibit.

MR. McINERNEY: No.

MR. WHITE: No.

By Mr. Mathias:

Q Mr. Tarr, I show you a document which has been received into evidence as Commission Exhibit 14-A through E, which is dated February 9, 1965, and ask you to briefly review this document.

A This document is the one to which I just had reference.

Q This is the document you delivered to Mr. Schmidt?

A This is the document I delivered on or about February 9 to Mr. Schmidt, and as you will see, it was for the Chicago and suburban areas.

Q What did Mr. Schmidt have to say about the February 9 offer?

A At that time, he accepted the whole thing as okay.

Q Prior to goint to see Mr. Schmidt with the February 9 offer, did you hold any internal discussions with Borden management concerning the approach that you were to take with Mr. Schmidt?

A Not that I can remember.

Q Was there any reason, Mr. Tarr, why this February 9 offer was limited to the Chicago-Calumet area, or Area 1, as you referred to it?

A There were many reasons. One of the principal reasons was when you got the outside area, the other 30 percent was divided up under many different orders. It had prices that were, generally speaking, lower than anything we had in Chicago way . It would be quite difficult, as I explained to Mr. Schmidt, and was when we went into it, and finally arrived at it, it was quite difficult.

It was bulky deal to keep up, because of all of the different orders within the area and lack of orders, too, which was the unregulated areas, and the different costs of distribution, and everything else that we had, and the fact that prices were lower.

Usually speaking, the prices were based on the prices of the local distributors. We had to sell as low as they did. We couldn't sell higher, or we would not sell any milk, and we could not sell ~~higher~~ lower because we would break the market and injure the existing small dairies.

Q In these other areas outside of Area 1, were there other systems of delivery in effect that were not in effect in the Chicago area?

A To some limited extent, I believe, at that time, there were some. I think we started on the three-day delivery through La Salle. I am not sure when it started, but it was already in effect, and we were working on lower deliveries, wherever we could, under the existing regulations that unions had there.

We didn't want to be struck if we went into a place and did that. We did not want to impose penalties on the existing dairies either, but there was a cheaper way of operating and did exactly as much good having every other day, or something on that sort, as every-day delivery, and it saved a great deal of cost.

Q So, where you could, where union contracts permitted, you were putting into effect fewer days delivery per week.

A That is correct.

Q In the Chicago-Calumet area, were you able to reduce deliveries?

A Not while I was with them, but they have since then, but not up to 1968 when I left.

Q I note in connection with the February offer referring to Commission Exhibit 14, that there are 11 products included in this offer. Was this the entire line of Borden sales to A & P?

A No, it was not.

Q Why were these 11 products selected for the offer?

A Because these products were large-selling items, and other products than what you see here sold to such a limited extent that it would have been very difficult, and was difficult, when we finally had to do it, to keep the items fresh and come out with a single batch of that item. You had to run a whole batch of item at one time.

Q Under a particular level?

A Yes. It was very difficult to do and, besides, these smaller selling by-products were pretty cheap in the outside anyway in many cases. I mean, we did not feel there would be enough advantage to A & P to get get into this, and it would be much better probably to retain the Borden level. We advised that way.

Q REferring to the six items at the top of the page, namely, the Homogenized Vitamin D Milk Gallon Paper, the Homogenized Vitamin D Milk, half-Gallon paper, Homogenized D Quart Paper, Two percent Half-Gallon paper and Vitamin Fortified Skim, Half-Gallon, and Half-and-Half pints; what percentage of your business with A & P approximately would these products have represented at this time?

A I don't think I could give an accurate estimate of that because ---

Q Would this have comprised the bulk of your sales to A & P at the time?

MR. WHITE: I don't know what the bulk of sales means. The word bulk does not, at least to me, denote any meaningful measure in this record.

By Mr. Mathias:

Q Perhaps we can refresh your recollection by referring you to the middle of this document. There is a statement in parentheses. Would you read that and see if that refreshes your recollection?

A The above items account for approximately 70 percent of total A & P sales. That means those items were the biggest selling items and did represent the largest portion of the entire line. These other five items that you see underneath were the biggest selling items -- let me put it that way -- were the biggest selling items of the poorer selling items of that 30 percent. Those were the biggest selling items.

Just what part of that 30 percent these would constitute, I wouldn't want to say because it would be a wild guess.

Q The document to which you referred ---

MR. McINERNEY: Excuse me. I did not want to interrupt the flow of the witness' testimony. The witness simply read from 14-E. I don't know if this has refreshed his recollection, and he now recalls this was 70 percent or whether he is simply taking it as that figure because that is what it says on the exhibit.

THE WITNESS: That is exactly why I am taking that.

MR. McINERNEY: Just because it says that?

THE WITNESS: Yes, I do know the Chicago area constituted ~~peculiarly~~ pretty near the total of A & P's business with us. This here, I read this and it is the same figure, but it is not my own judgement. I don't know except by reading this.

By Mr. Mathias:

Q Thank you. We understand now.

What occurred next in your dealings with A & P concerning private label products, Mr. Tarr?

A Things were rather quiet for quite some time. Nothing was said. Of course, we did not do anything, and we waited to see what was wanted. Some time in the first part of May, I believe it was, Elmor Schmidt came to me and said, "You know, we are not just satisfied with having this in Chicago. We want to have something we can feature all across the mid-west, and we have to have something for this outside area, even though it is a smaller amount, we have to have a uniform deal, a uniform product deal."

He said, "I want you to give us some quotes for the outside area."

To this end, we prepared them. I did not prepare them, but they were prepared by Mr. Malone, and others possibly came up with a quote. I believe we took that over. Mr. Malone went with me, and we took that over around May 26 or 25.

Q Sometime in the latter part of May?

A Sometime in the latter part of May, we went over with it.

Q These dates we are discussing are in the year 1965?

A That is right. The whole thing was consummated before the end of the year.

Q The February 9 date was 1965?

A That is right, and the May 26 date was 1965.

Q In this interim period between February 9 and early May, 1965 when Mr. Schmidt asked you for further pricing, were there any discussions or conferences concerning the A & P private label program within the Borden Company?

A No, we had nothing to discuss. Nothing was asked, and we gave nothing.

Q Did you continue to visit A & P on a regular basis during this interim period?

price change, prices to the trade. I would get on the phone and go over it with the sheets as rapidly as we could run them off.

MR. McINERNEY: I don't think the witness has quite answered your question. I believe the question was whether you would advise of theunderlying bases for price changes. I just wanted to make sure the witness understood the question.

THE WITNESS: I thought I mentioned that in the first of it. I described to Mr. Schmidt the reasons why I always accompanied this with a price change, and this was always done over the telephone. I would say there has been an addition to the super pool, or what have you.

By Mr. Mathias:

Q Was Mr. Schmidt interested in this information?

A Yes, he always wanted to know why and if there were any changes.

Q You stated that in late May, that you visited Mr. Schmidt. What was the purpose of this visit in late May, 1965?

A The original purpose was to give him this quote ~~and~~ on the outside areas and explain everything we had in the quote, and also to allow Mr. Malone to be over there at that time because Elmer has asked many questions on marketing orders. You see, these things were predicated on marketing orders.

Q Your quotations?

A Yes, Elmer did not understand it too well, and I did not understand it nearly as well as Joe Malone did. I learned that day about marketing orders, the same day Elmer did, to the nth degree. As a Sales Representative, I did not have to bother with market orders, and I know why they went up, but as to the workings of those things, I just never did know.

Q Was this the only area of discussion you can recall between Mr. Malone and Mr. Schmidt?

A There were a great many things talked about, I know that. Offhand, if there is anything you want to ask me, I will be glad to see if I can recall it.

Q I wanted you to recall whatever prerecollection shows as to what went on?

A It was quite a lengthy meeting. Elmer was enjoying it. He wanted to find out; it was educational. Let me put it that way. Elmer asked many questions, I think somewhat irrelevant to what we are talking about now, but many things about dairies.

Q Did Mr. Schmidt ask Mr. Malone about any areas of private labeling?

A I can't recall. I believe something was said about Wisconsin. I just know that that was touched on.

Q Just why did Mr. Malone accompany you on this particular meeting with Mr. Schmidt?

A I can't remember just what happened, but I am of the opinio that Elmer asked me. I think Mr. Malone had been over there once or twice prior to that. I told Mr. Schmidt the best man to explain market orders would be Joe Malone, and if possible, I would have him come along to the next meeting.

I could not swear to it, however.

Q You said this meeting lasted for quite some time, would you have any idea approximately how long the conference continued?

A It was lengthy, relative to the usual meeting I had with Mr. Schmidt.

Q Was it a matter of hours?

A Yes, I think it was not even consummated in an hour. This is just my opinion now in just looking back on it.

Q How did Mr. Schmidt accept the quotations on the other areas that you had brought with you in this May meeting?

A At that particular time, he was pleased very much. He thanked me and I thought everything was fine. We consummated what he wanted.

Q Did he ask you for any additional information?

A I can't remember.

Q Do you recall Mr. Schmidt mentioning a savings figure he hoped to attain as a result of the private label investment?

A Somewhere in the course of the conversation, Elmer said he kind of hoped or thought that maybe the savings between the cost of private label and the cost of Borden label would be an much as $500,000 ~~for~~ or something like that. I remember that figure was thrown out. He was hopeful it would come to something of that sort.

MR. McINERNEY: Again, I didn't want to interrupt while the witness was answering. I would have objected to that last question as having been leading, but the damage has been done already. I simply want to note I will object from here on in, to any such leading questions.

It is too late now, and I am not asking that it be stricken, because I think it would be useful. less

JUDGE HINKES: Try to watch that, Mr. Mathias. Ask the witness to relate whatever he can, and ask him if that was all that was said, and then use your leading question.

MR. MATHIAS: Your Honor, I thought we were getting pretty close to that point.

By Mr. Mathias:

Q Is there anything else that you can recall that was said in this meeting, Mr. Tarr?

A Not offhand.

Q Was there any other discussion of the savings that would result from Borden's offers?

A I don't know when some of these things were asked for, but there was a time -- I think it was later than that -- when he asked me to give him a figure of what this would amount to in savings.

Q When you say "this", what do you mean by "this"?

A The differential between the Gordon label and private label would amount to in dollars and cents and what we had at that time quoted, but I don't know whether that occurred, frankly, at about this time or at a later date, but that thing we did get into eventually.

Q Is there anything else at all that you can recall about this particular meeting, that is, the one in which Malone accompanied you in 1965?

A No, so far as I know, that was about it.

Q Following this meeting, did you and Mr. Malone report to Borden management?

A I think Mr. Malone did.

Q Were there any internal conferences or discussions concerning the status of the private A & P label matter?

A I wouldn't know if there were discussions or not with the Board of Directors, but so far as I can remember, I don't remember anything, particularly over at our place where it was discussed.

Q From February to late 1965, did you have frequent meetings with Mr. Minkler, Mr. Malone and others, in management group concerning the private A & P label business?

A No, not unless something was changed. That was the only time I was brought in.

Q What was the effect, that you can recall, in connection with the Borden-A & P negotiations following this May 1965 meeting?

A I know in the latter part of July, I went over there with a quote that included on outside points, a differential in cost, different costs, and a different uniform cost based on their deliveries which would apply to the private label.

Of course what might have happened was that prior to that, Mr. Schmidt asked me about it. I don't recall exactly how it came up.

Q Would this be in area No. 1?

A No, because with this solid union, they had here, it would be impossible to make break, but on the outside, we gave them quote we would move toward these things as rapidly as we could. You couldn't do it in Rockford, but you could do it in the outer suburban area.

You could do it inOttawa, La Salle, and many places. So some places, you could not go further than five days, but we were working down toward three all the time; Somewhat would havethe ultimate which was three days, so it was not the amount of saving, but a stepping stone from five to four to three, so that one man could cover two existing routes on that basis.

Q What relation did this have to July, 1965 offer?

A That is what the offer was. The offer was a pricing on private level, a quote, we were still not dealing them any, we did have it existing at that time in an area where we do even put it in on the Borden label. Mr. Schmidt, he wanted that much off, which was a saving and justifiably so, on the

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three different days.

Q Who prepared the offer in the delivery of late 1965, did you assist in the preparation of it?

A I developed it. It was my job to develop the differential in the three, four, five days. I don't know if Mr. Malone did or I did, but I am quite sure I had a hand in it.

Q Mr. Tarr, how was this quotation in late July -- first, was it delivered to A & P?

A Yes.

Q Do you recall who you delivered it to, sir?

A Mr. Schmidt.

Q This is the same Elmer Schmidt we have been discussing all the time?

A That is right. He was the head buyer of dairy product for A & P.

Q Did you ever have any dealings with anyone at A & P, other than Elmer Schmidt?

A If Elmer was not there, I would see Bob Hall. This was not on big questions. Hall was ~~the owner of the system~~ Elmer's Assistant, and I would talk to Bob at times.

Q Did you ever have any dealings with Mr. Schmidt's superior?

A Do you mean the Divisional Man, Bartels, for instance?

Q Was that Mr. Bartels?

A Mr. Bartels was the head buyer in the job that Elmer

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Schmidt had for years. I did business with Mr. Bartel, and he became Divisional Buyer. I knew him pretty well, so I talked with him, but we did not get into business. I did my business with Elmer Schmidt.

Q Mr. Schmidt was the Division Buyer, and Mr. Bartels was the District Buyer?

A Yes, sir.

Q Where there were a reduced number of deliveries possible in a particular area, say a three-day delivery, did Borden make this same type of delivery to every one?

A Yes. In fact, it was started with the Borden label. A & P was getting it with the Borden label, where the thing existed. Everybody was getting it. Whatever was in the area, that was the deal. If it was three days, it was three days for everybody, and that is the way it was.

You could take either three days or six days. If you took six days, you paid that much more for it, but that was in very rare exceptions.

MR. McINERNEY: I think the witness understood your question to mean was it offered to everybody, rather than everybody getting it.

MR. MATHIAS: I think the witness got my question.

THE WITNESS: He was offered and given.

MR. McINERNEY: Could we ask if that was at the customer's option?

MR. MATHIAS: I believe on cross-examination ---

THE WITNESS: No, it wasn't.

JUDGE HINKES: Just a minute.

MR. MATHIAS: On cross-examination, Mr. McInerney can ask any questions he likes.

JUDGE HINKES: It might be advisable to let the examination proceed, Mr. McInerney. Perhaps the train of thought would be interrupted to the detriment of Mr. Mathias' strategy. You will have ample opportunity, I am sure.

MR. WHITE: Since we have broken everybody's train of thought, could we have a recess?

JUDGE HINKES: Yes, let us take a short recess at this time.

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(A brief recess was taken.)

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JUDGE HINKES: You may continue, Mr. Mathias.

By Mr. Mathias:

Q I think when we left off, you had delivered a quotation to Mr. Schmidt in late July.

Did this quotation in late July include the Area No. 1, the Chicago-Calumet area, sir?

A No, because they couldn't have three-day -- you are talking about the July quotation?

Q The July quotation, yes.

A No, because you can't have three-day delivery in Chicago.

Q This only dealt with the areas outside of the Chicago-Calumet area?

A Yes, and I think even though we couldn't have it at one time we thought we might be able to do it at a later date.

Q Do you recall any discussion between you and Mr. Schmidt at the time you delivered the July quotation?

A He could have asked that time and perhaps he did to give him the differential between the cost, as I mentioned before.

Q This could be the cost savings?

A Cost savings to A & P on Borden label and all 100 percent private label providing the volume stayed where it was.

Q This either occurred at this meeting or some other meeting around this time?

A Somewhere between May -- it could have occurred in May. I don't remember, but from that time on I gave him figures over the telephone and sometimes I took them over to him. I did not give him any sheets at that time as to how we arrived at them.

Q After this meeting in July, then what did you do next?

A I believe the next quotation change was made about August 13 or something like that.

Q What had occasioned this change in quotation, Mr. Tarr?

A This was on the byproducts on the outside area, I believe, some of the small byproducts that Elmer felt should have a better differential than existed at that time on the quotes.

Q Did you then prepare a new quotation in August?

A In August, and delivered it around the 13th, I believe it was.

Q Did this quotation include the Chicago and Calumet area as well as the other areas?

A I don't think so. I think it was for just the outside areas because we had given them good prices on the quotes in the Chicago area for the byproducts.

Q Did you indicate to Mr. Schmidt the amount of savings that would be realizable under the Borden offer?

A I believe I did.

Q Did this savings figure include the offer for the Chicago-Calumet area as well?

A Yes.

Q Do you recall approximately the total savings figure that you had computed for A & P?

A I think at that time it was something like 386 or something of that nature.

Q For all areas?

A For all areas.

Q What occurred? Did you deliver this August quotation to Mr. Schmidt?

A Yes.

Q I believe you said this was around August 13th?

A I think it was, yes, sir.

Q Was anyone present besides you and Mr. Schmidt at this meeting?

A I can't remember, but I don't think so.

Q Do you recall what was said at this meeting between you and Mr. Schmidt?

A Only that it seemed acceptable to Mr. Schmidt. It was not unacceptable, let me put it that way.

This one might have been 400-and something.

Q Now you are speaking of the savings?

A Yes. I can't remember just which it was. It grew as we went along and I can't remember whether it was 400 and something or 380.

Q Mr. Tarr, I show you a document that ---.

MR. MATHIAS: Again, if it is all right with respondent counsel, I will show him a carbon copy 37 A through F.

By Mr. Mathias.

Q I would like to show you Commission Exhibit 37 A and ask you if this document refreshes your memory as to the amount of savings stated to Mr. Schmidt at this August 13 meeting?

A This is exactly what I meant when I said I was not quite sure it was up to the 410 or was in the 300-something. It was before that that it was 300-something. This was in writing.

Q Is your mind now refreshed as to the amount of savings in August?

A Yes, 410.

Q On August 13, the amount calculated was $410,000 and some for savings for Mr. Schmidt?

A That is correct.

Q Do you recall anything else concerning the discussion between you and Mr. Schmidt at this August 13 meeting?

A Not offhand I can't remember anything.

Q What occurred next in your dealings with A & P?

A I think about a week after that I was over to A & P and we talked about various things. Elmer said, "By the way, we have asked for bids from other dairies just to make sure you are right in this thing, and we felt it was better to get outside bids to make sure everything was correct on your costs and so on."

Q What did you say to Mr. Schmidt at this point, sir?

A In the first place, I was surprised because I understood and was told it was not going to be put out for competitive bids because then everybody would know about A & P going into private label, and I did not think anybodywould bid lower than we bid anyway. I was quite disappointed and a little shocked that he had asked for bids and I told him so.

Q What else did you say to Mr. Schmidt?

A I can't remember, but it was along that line.

Q Did you mention any fear concerning the results of requesting competitive bids?

A I don't know at that time. I know at other times I had told Elmer some people would like to get this business pretty badly and they might bid under any "conclusion reasonable figure" to get it hoping they would be able to make it up later since it was a new business for them and it was the no entire business for us. I don't know if that was the particular time but that was mentioned in the course of things.

Q Did Mr. Schmidt indicate what other dairies had been contacted for bids?

A Not in so many words. He did mention some names along in the course of things, but he did not actually say these are the ones that were asked for bids or anything, but he did mention the names of a couple of dairies.

Q What dairies were named?

A He mentioned Bowman's.

Q When you did mention your fear to Mr. Schmidt concerning the possibilities that other dairies would underbid Borden at an unreasonable price/just to obtain the business, what did Mr. Schmidt say to you?

A It seems to me he said something like, "We understand these things and we would recognize if someone came in with something like that -- we would certainly recognize it as such. You don't have to worry about anything like that. If anybody comes in with anything that is crazy, we would know it."

Q Was there any other discussion at this meeting in which he mentioned that the matter was to be put out for bid?

A I can't recall anything else.

Q Who was present at that meeting?

A I am quite sure it was just Mr. Schmidt and myself.

Q What occurred next in your negotiations with A & P?

A I may not have these things in proper sequence, but I will try to develop them along that way. It seemed to me around September 1-I know this happened-that Elmer called me on the telephone on a late afternoon -- I don't remember what day of the week it was -- he was very agitated. He said, "I have a bid in my pocket. You people are so far out of line it is not even funny. You are not even in the ball park." This was on the telephone. He was on his way home at the time he called me. He said, "This is really terrible. I am shocked at the big Borden Company and the relationship we have. I have a bid right here in my pocket."

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He said, "This bid is so far different from yours that there isn't any comparison."

He said, "Suppose you see me the first thing in the morning."

I said, "I will be glad to."

I went over to A & P the next morning. In fact I told my people what he said immediately. The next morning I went over to see Elmer and he said, "Look, this is terrible. I don't understand it at all. You are nowhere near in the thing."

TRUE

I said, "You know all the things we do for you. We have promotions, and this and that and we have manpower out in the field. I told you there would be some bids that might come in that might be scrawy, and I don't see how anybody can sell any cheaper than us. I can't figure the deal out, but certainly they can't be doing what we are doing."

He said, "If the promotions you are giving us are costing $50,000 that would not be a drop in the pocket between your bid and the other man's bid."

True

I said I couldn't understand and I told him I would go back and talk to my people, which I did.

Q How long was this discussion in Mr. Schmidt's office. Were you in his office for a long time?

A I don't think it was a long time. It was not like the time Joe Malone was there. It was brief and to the point.

Q Did you attempt to obtain any information as to the character of the competitive offer Mr. Schmidt had?

A There was no sense in that because he said he couldn't tell me what it was, and I knew he couldn't and wouldn't. Always in a case like that I would try to feel around a little bit and I think I did in this instance. I don't remember what I said or what I asked, but I did feel around a little bit.

Q Did you keep the conversation going for a while?

A A little bit, I guess. In the course of it he said he couldn't tell me and I told him I was not asking him who. I was just trying to get some idea because I couldn't understand it anyway. The only thing I got for a suggestion was $50,000 would not amount to anything, that it would be a puffer ~~comparied~~ compared to the total amount. That is all I knew for that particular time.

Q Was there any mention as to whether or not there was one bid or more than one bid?

A At that time he said "A bid in my pocket."

Q Was there any indication as to who the competitive bidder was?

A No. There wasn't anything said as to who it was. I don't think I tried to find that out. I tried to see if I could get some basis of figuring the thing out. That is all.

Q What happened next? Did you go back and report this to your management?

A Immediately.

Q This is to the management of Borden?

A Yes.

Q And that would include Mr. Minkler and Mr. Malone?

A That is right.

Q What occurred next?

A I guess they went to work on trying to see what they could work out of this thing without anything like manpower and product guarantees and any of these kinds of things. All the guarantee then would be that milk would be in good shape when it was delivered. After that, it was their property and all the things we could possibly make any savings on, but I did not work these things out.

Q You did not participate?

A I did not participate. I believe Joe Malone and others did.

Q Did you participate in any of the conferences leading to a new quotation?

A Only when they arrived at what they thought they were going to do, and prior to the time when I came back from A & P and mentioned it, I think they called a special meeting and I had attended that.

Q Did Borden then prepare a new offer?

A They did.

Q What happened next?

A I think it was about a week later I made an appointment for

Mr. Minkler and myself to meet with Elmer Schmidt. When I went over there Elmer reiterated all the conversation almost verbatim that he had with me, that it wasn't even in the ball park, and how shocked and surprised he was at our company trying to go along with such a low bid when someone else was bidding high, and all the whole thing.

At that meeting Mr. Minkler had prepared a statement on the amount but it had not actually been divided up by products or how we were going to do it, but this was calculated on what Mr. Minkler called anyhow accounting.

Q What was that?

A It was a new type of term that described a company feeling this was extra business for them and, therefore, they would not put any overhead on to the product, hoping that perhaps later they could and would go the limit that they could possibly go on "anyhow accounting" -- in other words, eliminating the normal procedure in accounting of charging overhead and all these other things to the product. We came up with a figure just double what this $410 was -- $820,000. This would eliminate all services, all manpower, all these things that we were doing. It would be a drop delivery. The drivers would not put the product away. They would not put it at the dairy. They would leave it at either the back door or at the back of the cooler, and there would an advanced order system that would go into effect so we would know what to prepare for A & P for the next day and the orders could not be changed until the next afternoon and all overhead was eliminated, too, I believe in the calculations. This was what he called anyhow accounting -- anyhow they wanted it.

Q In the discussion between Mr. Minkler and Mr. Schmidt, what did Mr. Minkler say about this $820,000 figure?

A He described it as "anyhow accounting". He said, "You know, we are pioneering this, and we pioneered this three, four, five day thing, and we have tried to do everything to get dairy prices down lower for you and everybody in the business." He said we had been doing things for him that we could not continue to do and we could only guarantee that it is a good product, in good saleable condition, and beyond that it is your product.

Q So Mr. Minkler did mention the term anyhow accounting to Mr. Schmidt?

A Yes, he described it entirely to him and to me too.

Q What did Mr. Schmidt have to say concerning this new quotation?

A He said, "Now you are in the ball park."

Q Was anything more said between Mr. Minkler and Mr. Schmidt at this meeting?

A He said, "Please give me in writing all these things you cannot do now which you did."

Q What about the individual product prices?

A We would have to work this out and we would get back to him with the prices.

Q At this meeting, this $820,000 saving was the entire quotation, is that correct?

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A That is right. Was a quote that the differential would come out to $820,000.

Q Then this had to be spread throughout the product line?

A That is correct.

Q Was Mr. Schmidt aware of this fact?

A Yes.

Q Did he make any statements concerning the spread of the price to the product line?

A He said we were in the ball park.

MR. McINERNEY: I object.

JUDGE HINKES: Strike the answer.

Rephrase your question.

By Mr. Mathies:

Q What else was discussed by Mr. Minkler and Mr. Schmidt at this conference?

A There were quite a few things talked about. Offhand, I can't remember just what any of the other things were. These were the important things in relation to the quotes.

MR. McINERNEY: I would like to move to strike the question and answer which had to do with whether Mr. Schmidt was aware of something. As far as I recall, there was no

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basis for that in testimony as to what was said and done. In any event I think it was an improper question.

MR. MATHIAS: Your Honor, this witness was present at the meeting. The prior question to that had elicited the information that at this point the quotation or offer by Borden was strictly for an $820,000 saving figure and that this had not been spread through the product line. I merely asked the witness if Mr. Schmidt was aware of this fact.

JUDGE HINKES: The witness answered Mr. Schmidt was aware, but can you tell me how do you know Mr. Schmidt was aware?

THE WITNESS: He had been told it was the amount, and we had not developed it. We will develop it.

By Mr. Mathias:

Q What occurred next, following this meeting of early September, 1965? What was the next development in the dealings between Borden and A & P?

A I think the next thing was Elmer told me he was going to take a vacation just a couple of days afterwards. His wife was going to have a baby and he was going to take his vacation at that time. He was not going to leave Libertyville and anything we had to report we could call him up at our house and he would direct what we would do with it. He said, "Get busy with this breakdown because we are losing money every day until you come up with this quote. We want to buy private label and Borden possibly rather than straight Borden."

Q Did Borden compute out an offer spreading this $820,000 to the product line?

A Yes, but there was something else in between that.

Q What was that, sir?

A Elmer Schmidt had always wanted to have glass gallons in the private label line. We felt it was rather impossible in our operation to put a private label gallon jug which would have to be sorted out, come back to us and sorted out and kept separate and operate the thing correctly with the number of A & P bottles as well as ours. It would be an awful mess. We felt it would be impossible to work the thing under the present situation.

However, during all that time there were some thoughts being given to it. Production was being asked about it and others. It was finally decided that we could put out a gallon glass with an unlabeled bottle having an insignia on the bottom. It would not say Borden, but an insignia so we would know it is our bottle and take it back and have one cap for Borden's and put everything on the cap, and another cap for the A & P and still use the same bottles, and this could work out maybe, and we could develop something like that.

Q Why would Borden want to include the bottles in their quotation?

MR. WHITE: I object to the form of the question. There is no basis for that.

THE WITNESS: Elmer wanted it.

By Mr. Mathias:

Q Was there any advantage to Borden to include the glass?

A Elmer thought there was afterwards, but we did not think it that way. We thought Elmer wanted it that way and we were developing an overall plan for the $820,000.

So, anyway, shortly after Elmer had gone on vacation, I called Elmer and asked him what he thought about having glass gallons included in the quote and he felt -- his first reaction to this was it should be glass private label, and I felt we could work it out on the basis of a plain glass gallon that would have the difference on the cap between Borden and A & P. Elmer thought that was a good idea. He said no private label program could be complete without having glass gallons. It had been what he had been talking about for a long, long time, so he thought that was fine at that point.

Q How did the price on the glass gallons compare with paper gallons?

A Cheaper, at least with Borden.

Q Why was that?

A Because glass has maybe 25 times use and while it costs somewhat more than paper, the paper gallon costs more than two half-gallon paper cartons so, you see, there is no saving in paper gallons actually. It is something stores sell less. There is even a little greater cost for the dairies. So, if we are trying to get something that is cheap, paper gallons could not compare with glass gallons.

Q Were the glass gallon jugs included then in a quotation to the A & P?

A They were.

Q Was this quotation delivered to A & P?

A Yes, it was delivered to Bob Hall. I called Elmer and told him we had the quotation all ready. We found out about the glass gallons then and the glass gallons was in the quotation. I talked to Elmer and he said give it to Bob Hall, which we did. Mr. Minkler went over with me and we delivered it to Bob Hall who asked a few questions but nothing of any import and nothing that I can remember exactly. He asked questions about different things and accepted the quote.

Q Was anyone present at this meeting besides you and Mr. Minkler and Bob Hall?

A No. We went to a private office there.

Q Was there any discussion at this meeting that you can recall?

A Nothing, except I said there was nothing important. I can't remember anything that was said actually but there wasn't anything important.

Q What occurred next following this meeting with Mr. Hall?

A Elmer got on the phone and he was very excited again. He said, "You are pulling a fast one here. You are putting glass gallons in here as part of the $820,000."

I said to Elmer, "I checked this with you and it was part of the program."

He said, "It is not fair to the other bidders." He said, "They were given figures on all these items and they did not bid on glass gallons."

I said, "I thought you wanted it, but if you don't want it we will take it out and figure it just on these other things. I thought you wanted glass gallons and that you were after a certain figure."

So that is what we did.

Q Was this in a telephone call that Mr. Schmidt gave you this information?

A There was one time and this may have been it when he came down from Libertyville and met with us or met with me -- I can't remember.

Q But you were involved in this communication from Mr. Schmidt?

A Yes, it was a telephone call to me. I know on one occasion he came down from Libertyville, and I don't recall if this was the time or not.

Q What occurred after this communication from Mr. Schmidt?

A We changed the quote and left out the paper gallons and developed the things along the lines --

Q You stated paper gallons, did you mean the glass gallons?

A Yes, we left the glass gallons out and then sometime right about that time Elmer said to me, "Look, sharpen your pencil a little bit because you are not quite there," meaning what the other party was bidding, I guess. So, as we developed the new one I think it came out a little higher because we found some or products we could give a little better deal on and we did.]

Q Was this next quotation delivered to A & P?

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A That was the final quotation and it was delivered to Elmer -- by that time his wife was in the hospital and the baby was not born yet and he did not dare leave town, but he wanted to see us and see the whole thing. I guess he was some officer in the Veterans of Foreign Wars up there in Libertyville, so he opened up the club for the three of us and we sat there and discussed the whole thing in great length.

Q Who was present at this meeting?

A Mr. Minkler, Mr. Elmer Schmidt, and Mr. Tarr.

Q What was said at this meeting by Mr. Minkler?

A He explained the whole thing to Elmer. He explained how the thing worked. It was a very smooth quote in that you could take any area and take the marketing price, and you could compare that with the marketing price of another area and the different price and you would find that the differential was exactly what that difference in cost was. If the first market went up to the second market, it would be still as the second market, if the paying price went up. This was a beautifully worked out thing that was foolproof. Here was the whole thing and just what he asked for and he liked it.

Q What did Mr. Minkler say to Mr. Schmidt, if anything, at this meeting?

A He said many things. We talked about many things there but I can't remember all the things that were talked about, but I can remember the end of it.

Q What was that, sir?

A At the last of it Mr. Minkler said, and I can't give you his exact words, but in effect he said, "Now, Elmer, look, we have met a competitive situation here on this bid, on this quote. You know that. This is right, isn't it", and Elmer said, "Yes."

He said, "Now, I want you to be sure to save the bids in a safe place."

He said, "They are being saved, and I know what you mean. The Legal Department has them at the moment and the Legal Department will probably keep them."

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He said, "I understand you, I read you loud and clear", or something like that.

He said, "I think this quote will be very acceptable to our people. I don't think there is any reason to presume that you won't be serving us very shortly with the ~~amount~~ account."

Of course I told Elmer there had been a little change from when we started this back in February, and there has been a little change in the market orders, and I said the prices we quote to him would ~~not~~ be different because they were predicated on the lower market order, but just so he understood this is the way it works, and he said he understood.

Q Was this the offer accepted by them?

A This was the offer that was accepted.

Q Was anything else turned over to Mr. Schmidt at this meeting other than the price quotation?

A I think there was a sheet also showing the differentials. It was somewhat more than $320,000, a little bit more than that.

Q Mr. Tarr, you mentioned that there had to be an adjustment or adjustments on the pricing in this final quotation due to changes in the raw milk costs in some of the areas. Were these changes later made?

A Yes, before we sold them. That went on a regular price sheet, the same kind of price sheet -- they weren't on these kinds of things. You have seen those price sheets.

Q I show you Commission Exhibit 75 A through J for identification and ask you if you can identify this document. Ignore for the moment at least any handwritten notations on the documents.

JUDGE HINKES: Any time you get to a convenient point, let me know.

MR. MATHIAS: We are just up to the point where sales began under the arrangement and I think we can establish that date and then take a break until tomorrow morning. We are just about at that point. This is very close to the end of this portion of our questioning.

By Mr. Mathias:

Q Referring to CX 75 F through J, Mr. Tarr, which is a series of pricing sheets dated October 20, 1965, can you tell me what these sheets are, sir?

A They are the prices in effect at the time -- October 20 -- which included that increase which I say was three cents and now I know it was because the quotes before were all based on 4.29 and this was 4.32 on the Chicago marketing order. I don't know what they were in the others so I can't say, but this would be the prices in effect at the time we started to sell them in November.

Q This was the adjustment you told Mr. Schmidt had to be made at the earlier meeting?

A Correct. These prices are not the same as on the prior bids because the prior bids were based on a 429 marketing order price, and 432. It was a super pool price.

Q Was CX 75 F through J delivered to A & P?

A I believe this whole thing was delivered to A & P. This is the thing as I mentioned before that he was asking for.

Q You are talking about CX 75 A through J?

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A Yes, that is the thing he said he wanted to have the whole exact thing. In fact, I think this is the one I delivered over there. I think I developed it for Elmar Schmidt -- no, it couldn't be because this was given to him later. The September 21 one gave the things we could and could not do.

Q These are the terms of the private label program?

A This is exactly right, the ones we spoke about when we said we couldn't go along with all these other things if we were going into that type of deal.

Q That would be Commission Exhibits 75 A through F?

A That is correct.

Q To your knowledge, all of this document was delivered to A & P?

A It was.

Q Can you recognize the handwriting appearing on certain pages from CX 75 A and B.

A A & B.

Q Yes.

Whose handwriting is that, sir?

A I don't know. It is not mine.

Q The handwriting is not familiar to you?

A I wouldn't know. I couldn't tell you anybody's handwriting in the Borden Company. I know it isn't mine. It might be Elmer. I don't know where it came from.

MR. MATHIAS: I offer CX 75 A through J in evidence.

PROCEEDINGS

JUDGE HINKES: The hearing will be in order.

Let me remind you, Mr. Tarr, that you are still under oath.

MR. TARR: Yes, sir.

JUDGE HINKES: I believe that you had not completed your questioning, Mr. Mathias.

MR. MATHIAS: That is correct, sir. I still have a few questions to ask Mr. Tarr.

JUDGE HINKES: You may continue.

J. GORDON TARR resumed the stand and testified further as follows:

DIRECT EXAMINATION (resumed)

By Mr. Mathias:

Q Now, Mr. Tarr, prior to the A&P-Borden private label arrangement, what duties did you perform for Borden in connection with their sales to A&P Stores?

A The same as I did right along even after and before. Anything pertaining to changes of any sort, that is, price-wise or anything else, I contacted the head buyer, whoever it may have been at that time. There was Harshbarger and then later Ira Bartels and later than that, Elmer Schmidt -- with anything. We operated a lot of promotions with them and all kinds of details that are involved with the sale of milk.

I kept them informed of all that was going on.

Q And this was both before and after the private label?

A That is correct.

Q Now you mentioned yesterday that you had men in the field working under you as well. Did they perform these same types of services for A&P in the field?

A Well, under orders. They went where we instructed them to go. For instance, where there was a store opening, they took care of the opening and saw that the milk was there in the right way. They knew even better than the store manager who was going to operate the new store and they would assist in the order even.

It is perishable merchandise and it needed to have someone who knew what could be done, what could be sold and so on.

Q Were these same services performed in the case of new store openings following the private label arrangement?

A No, that was part of the thing that was going to be eliminated.

Q Did the men working under you in the field still work with A&P -- still work with you in the field following the private label arrangement?

A Not to the extent they did. We only had one man finally where we had a group of men doing promotional work. After that there was just one man and it was necessary to have one to see that all these things were working right.

For our own benefit, not for A&P's. It wasn't so much promotion as it was detail and to -- see, there were advanced orders and we had to instruct these managers how to do it and a lot of problems came up in the field.

Q Did this one man work only with A&P?

A No, he worked with some other stores occasionally, but largely with A&P.

Q Now, how much of your time following the private label arrangement was spent in dealing with the A&P account?

A Well, just about the same relative amount that it was before the greater part of my time, because there was still a great deal of detail connected with this at headquarters. It didn't lessen any, let me put it that way.

Q In connection with the final quotation to A&P and the arrangement under which Borden supplied private label products to A&P, what arrangements were made for increases in raw milk costs?

A Do you mean what arrangements were made in order to pass the increase on private label?

Q That is correct, sir.

A Well, this was worked out on a regular formula basis that so much a hundredweight, the prices would increase by certain amounts, very exact formula.

Q Do you recall whether or not subsequent to the beginning of private label sales do A&P -- what happened to the raw milk costs?

A Would you please repeat that?

Q Did they increase or decrease?

A After ---

Q In subsequent years.

A Let me say they fluctuated. I think they increased more than they decreased. Certain times of the year after December milk prices generally used to go off. I mean go lower up to about June and then later on in July and August prices start up again. This is the general trend, because of the supply and demand factor.

Q Other than this seasonal change was there any general trend?

A I think the general trend was up. I mean things were becoming more costly, but not to any large extent. It wasn't any large amount.

Q What provision was made for other increases in costs to Borden, say, labor costs or container costs?

A Well, that was handled by whatever --- there was an agreement with us and A&P that whenever labor costs went up, we could reflect that in the cost of the product? It had to be a reasonable amount. I didn't handle that so much as Mr. Gosè did, but Mr. Gosè and I went over together always on those things.

Q Do you recall whether or not there was a formula type of increase in this instance, such as there was in the case of raw milk cost increases?

A I never worked it out. I am not familiar with just how it worked out, but the reflection of that per quart of milk is the thing. The total cost per quart of milk increase was the labor cost.

Q Was there any set formula for pricing for this type of cost increase or did this have to be renegotiated at the time?

A It had to be renegotiated.

Q Do you recall having been involved in any such negotiations dealing with increased labor costs?

A Well, as I say, I went along with Mr. Gose. He outlined the thing and did the talking on that, on that particular phase of it.

Q So were you generally familiar with the nature of the negotiations?

A To some extent, yes.

Q Do you recall an increase in the cost of labor and containers in the spring of 1966?

A Well, I remember there was such a thing. Right now I can't recall the details.

Q Mr. Tarr, I hand you Commission Exhibit 153A through Z13 for identification and ask you to familiarize yourself with this set of documents, sir.

MR. MATHIAS: Your Honor, I would like to correct the record. I stated I had handed Mr. Tarr Commission Exhibit 153A through D13 and it was in reality A through Z14.

THE WITNESS: Yes, sir.

By Mr. Mathias:

Q Are you familiar with this set of documents?

A Yes, I am.

Q What are they, sir?

A These are the paying prices or the selling prices to A&P, wholesale prices on the Borden label in Area 1, which was Chicago suburban and Calumet areas during the dates shown from April 23 until June 12, '67. From April 23, 1965.

Q Mr. Tarr, is this a Borden form or an A&P form?

A Borden form.

Q And who prepared it, sir?

A I did.

Q I note on most sheets there appears what appears to be a signature, J. G. Tarr. Is that your signature, sir?

A That's right.

Q And were these sheets generally delivered to A&P by you?

A Always, practically.

Q And this would be to whoever was the milk buyer at that time

A This is correct.

MR. MATHIAS: Offer CX-153A through Z14 in evidence.

MR. McINERNEY: No further objection, Your Honor.

JUDGE HINKES: Mr. White?

MR. WHITE: No objection.

JUDGE HINKES: 153A through Z14 is received.

(The documents referred to, heretofore marked for identification Commission's Exhibits 153A through Z14, were received in evidence.)

By Mr. Mathias:

Q Mr. Tarr, I now hand you CX-154A through Z for identification and excluding any handwritten notations thereon I would like to ask you to familiarize yourself with this document, sir.

A Yes, sir.

Q Are you familiar with this set of documents, Mr. Tarr?

A I am.

Q And what is this set of documents?

A This set of documents is the price sheets, our selling price sheets to A&P for the period from February 17, 1965 to May 15, 1967, for the area in what we call Area 2-I, which was West Central Indiana.

Q This would not include any of the Chicago-Calumet area?

A No, sir. This is another area of operation.

JUDGE HINKES: This is still the Borden label?

THE WITNESS: Still the Borden label on all these items. No, wait a minute. When we get over here a ways -- I am sorry. When we get over to November 8, 1965, there is a private label in here. In fact, that is the only private label. There is one that is a private label in here.

MR. WHITE: Might we identify that?

THE WITNESS: At least it is marked that way, I presume it is.

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MR. McINERNEY: I think it is clear and if it isn't, I would like to ask the witness a question on voir dire.

JUDGE HINKES: You may do so.

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VOIR DIRE

By Mr. McInerney:

Q Mr. Tarr, did you ever give a document similar to this one to A&P?

A No.

Q And is it fair to infer that you never gave this document to A&P?

A No. As far as I know, I didn't.

Q Well, can you tell us looking at the document that you have in front of you whether you ever gave that document to A&P?

A As far as I know, I never did.

Q Well, this apparently has to do with the Hammond region if you have anything to do with the Hammond region?

A Yes, it was part of the Chicago operation, our Chicago branch operation.

Q Insofar as that region was involved with chains to whom you were selling, is that correct?

A Well, this was given not to chains. It was given to other eastern chains. There was a discount schedule attached to that, you see.

MR. McINERNEY: Thank you.

mail or the wholesale delivery. These have retail as well as wholesale list prices.

Q Where a retail price appears on such a price sheet, what does this apply to?

A This is the list price for the retail deliverers who delivered house to house.

Q This was retail home delivery prices?

A Retail home delivery, and the wholesale is the stores. And there is also in here, the first one, CXID B-120 is a discount schedule and there is another discount schedule on here on January 3. That is 123A had a discount schedule in it besides a letter to grocers explaining various things.

MR. McINERNEY: May we ask whether the witness knows ----

MR. MATHIAS: Your Honor, I wish -- Mr. McInerney would not interrupt my examination. If he has voir dire questions, he may ask them prior to the introduction of the document.

JUDGE HINKES: Yes, I think we ought to let complaint counsel continue unless there are objections to question being asked.

By Mr. Mathias:

Q Now are these documents similar to those used in the Chicago area?

A Yes.

Q And are the similar to documents which Borden uses in its trade throughout the areas where you were familiar?

A Yes.

Q These were documents prepared and disseminated by Borden in the regular course of its business?

A Yes.

MR. McINERNEY: I object to that. That is a question that calls for a legal conclusion.

MR. MATHIAS: Your Honor, I think that is a factual question.

JUDGE HINKES: I will overrule the objection. I think this witness is competent to answer that.

MR. MATHIAS: Would you read the question?

(The reporter read the question.)

THE WITNESS: Yes.

MR. MATHIAS: The answer was "yes, sir"?

THE WITNESS: Yes. As far as I know, yes, I had nothing to do with it. Let me put it that way.

By Mr. Mathias:

Q But you were familiar with this general type of operation?

A General type of operation, yes.

MR. MATHIAS: I offer CX-120 and 122 through 136 with subparts into evidence.

MR. McINERNEY: Your Honor, I would like to object to the last question and ask that the answer be stricken. I think the question about being familiar with this general type of

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JUDGE HINKES: On the record.

MR. MATHIAS: Your Honor, there is no further direct.

JUDGE HINKES: Very well.

Mr. McInerney, would you like to take cross first?

MR. MCINERNEY: Your Honor, I'd prefer to have Mr. White cross examine first in accordance with your Honor's previous ruling.

JUDGE HINKES: Very well.

CROSS EXAMINATION

By Mr. White:

Q Mr. Tarr, I hand you Commission Exhibits 153-A through Z-14.

A Yes, sir.

Q Do those documents relate only to the Borden label?

JUDGE HINKES: If you have something specific in mind, Mr. White, perhaps you can suggest it to the witness.

MR. WHITE: He is just about finished going through them your Honor. I just wanted to clarify this one matter about these exhibits.

THE WITNESS: Yes, sir, they all refer to the Borden label.

By Mr. White:

Q Mr. Tarr, in your direct examination I believe you testified that with respect to Commission Exhibit 154-A through z that each of these documents related to the Borden label except for 154-J.

A That is correct. Private label.

Q 154-J related to private label?

A That is correct.

Q And these price change notices were on a form that you were using at that time?

A Yes, sir.

Q There was a basic form here?

A Yes, a master sheet on which we made film and we typed on film, and they removed each one where there wereprice changes and left the others on. It eliminated errors and also made it much easier to show price changes and instead of showing price changes it gave you a full sheet of price cost at that time.

Q I notice, for example, on Commission Exhibit 154-I, down in the lower right hand corner is the statement, "These prices are available to all on proportionately equal basis."

Do you see that?

A Yes, sir.

Q On Commission Exhibit 154-J no such language appears.

A That is correct.

Q Do you know who directed that that language be taken off of the form?

A I am not sure but I believe Mr. Malone.

Q And to whom did he communicate that as far as you know?

A To me.

Q And what did you do?

A I had that removed from all master sheets.

MR. MC INERNEY: Your Honor, I am going to note an objection to this line of testimony. I am not sure that it is any part of Borden's defense to this case.

JUDGE HINKES: Mr. White?

MR. WHITE: I am finished. I was simply trying to clarify these documents, your Honor.

JUDGE HINKES: Well, did you get an answer from the witness, Miss Reporter?

(Record Read)

MR. MC INERNEY: Your Honor, I am objecting to the entire line of questioning. It is not simply that last question and answer and I am sure your Honor appreciates --

JUDGE HINKES: Your objection is untimely but I gather what you are asking is that the colloquy be stricken.

MR. MC INERNEY: Yes, sir.

JUDGE HINKES: I will hear from you, Mr. White.

MR. WHITE: Your Honor, these exhibits have been admitted in evidence against Borden and I think it is proper for him to explain the forms and for me to inquire about them.

MR. MATHIAS: Your Honor, I think Complaint Counsel should be heard briefly on this same point. This perio of there?

A The prices to A & P.

Q Charged by Borden?

A Charged by Borden, yes.

Q Now, once Borden commenced supplying private label milk products to A & P did that include service to any A & P stores in the State of Iowa?

A No, sir. We never sold private label in Iowa.

Q Yesterday you discussed an occurrence where you delivered a price quotation to Mr. Bob Hall of A & P. Do you recall this?

A Yes, sir.

Q And I think, Mr. Tarr, you said that Mr. Hall accepted the quote. Did you mean that he merely received it or this he told you that it was acceptable?

A No, he merely received it. I used the wrong terminology.

Q Mr. Tarr, at any time during the private label negotiations about which you have testified or subsequent thereto, did you discuss with any representative of A & P or did anyone else discuss in your presence with any representative of A & P price at which A & P would or intended to sell private label milk out of the store?

A No, sir. I Emphatically no.

Q Was there any such discussion concerning the Borden label?

JUDGE HINKES: Well would he know? That's the issue.

By Mr. McInerney:

Q Did you know the prices that were being charged on Borden label milk to A & P and the other chains, Mr. Tarr?

A Yes.

Q And were the prices that were charged to A & P and to the other chains on private label milk --

A Yes.

MR. MATHIAS: Your Honor --

MR. MC INERNEY: I am sorry Mr. Mathias is objecting in the middle of a question.

(The question was read by the reporter.)

By Mr. McInerney:

Q -- available to A & P and to the other chains on the proportionately equal basis?

MR. MATHIAS: Now I object your Honor on this basis. The question has no relationship to the notation on this document which states these prices are available to all on a proportionately equal basis.

Mr. McInerney's statement is the question is not related to that statement. He has asked a question concerning pricing to A & P and to other chains.

MR. MC INERNEY: Your Honor, Mr. Mathias objected when I used the exact language of the document and now he is objecting that I haven't used the exact language of the document and I will go back to using the exact language of the document.

JUDGE HINKES: I would think we had better stick to the exact language of the document.

By Mr. McInerney:

Q Mr. Tarr, this form states "These prices are available to all on a proportionately equal basis."

A Yes, sir.

Q Now you knew what prices were being charged to the customers that you served, is that correct?

A That is right.

Q Now, tell us please whether that statement was true?

MR. MATHIAS: I object, your Honor, there still has not been any proper foundation. He has not established whether this witness knew the pricing to all other customers in this market area.

MR. MC INERNEY: I think that is something Mr. Mathias can argue about later.

JUDGE HINKES: I think the witness's answer is familiar that is the statement that he is familiar with the prices that obtained is sufficient to be the basis for an answer to the pending question. I will overrule the objection.

A He had already done it. He had put it out for bids when I knew about it.

Q Isn't it true that you tried to persuade Mr. Schmidt that other dairies might not give him reliable prices in the sense that they might come in with a low price originally and then try to jack up the price later on?

A Well, I told Mr. Schmidt. I wasn't trying to persuade him of anything, but I told him that somebody might bid on this thing on a basis of trying to get the business at any cost and it wouldn't be a realistic bid based on their cost but hopefully if they got the business they could sometime later on perhaps get the thing into a profitable way and this has been done many times in business dealings and I did tell him that, and he said he would recognize that if that was what it was. He knew those things existed and he recognized it. So I didn't try to discourage him from putting the thing out because he already had put it out for bids so he said.

Q Now, when you learned that an A & P had received a lower quotation were you and Mr. Minkler somewhat embarrassed about that fact?

A Yes.

Q And did you discuss how you would explain to A & P that they had received a quotation which apparently was greatly at variance with the one that you had submitted?

A I don't remember that we discussed it. Mr. Minkler

A I don't know that for sure. I know that he wasn't the last word in this thing. He had to bring it to his people. Just like I wasn't the last word in anything to do with this private label business either.

Q Now I believe that you told us that you first heard the term "anyhow accounting" from Mr. Minkler during a meeting that you and Mr. Minkler had with Elmer Schmidt sometime in September of 1965?

A Yes, sir.

Q When Mr. Minkler used that term did he use it with reference to the competitive offer that A & P had received?

A Well, he explained "anyhow accounting" to Elmer. I don't think that he directly said that they did this by anyhow accounting. It's what we presumed. I guess what Mr. Minkler presumed with a bid like that it had been done through what he called anyhow accounting.

Q And he did not say that Borden's quotation was based on anyhow accounting, is that correct?

A No. He tried to figure out what they had done anyhow accounting and had come up with a figure -- you see, we didn't make this accountingwise. We made it competitivewise, made this figure that we came out with. He hadn't set it up on products at that time.

Q But my question whether it isn't a fact that when Mr. Minkler used the term "anyhow accounting" he was referring to what your competitors might have done and not what Borden did.

A This is right.

Q So he didn't use the term anyhow accounting with reference to the Borden quotation, that being based on anyhow accounting?

A That is right.

Q Now, wasn't it a normal business practice in the dairy industry to meet competitive prices?

A Yes.

Q And you did that not just with respect to any offer that you might make to A & P but with all of your customers, isn't that correct?

A Yes.

Q And did it happen from time to time or fairly frequently that a customer would say that they could get a better price elsewhere and you would meet that price?

A Not necessarily. We could elect whether we wanted to or not.

Q But when that did happen though, did you ask the customer for some --

A Proof.

Q Proof in what form?

A Well I suppose an invoice. You see, none of that applied to me. I am just speaking about what was done in the wholesale division and I know it was done. They didn't meet all competition.

Q But when they did --

A When they did they wanted proof usually.

Q What kind of proof?

A Either an invoice or a bill that they had. Usually milk is sold to most people on the basis of cash and they'd have a cash sales ticket that would cite that. But I don't think we met it in the majority of cases even with single accounts because a lot of funny things were going on and you couldn't believe a lot of the things that the grocer would tell you.

Q But whenever you did do it you made sure that you were actually meeting the competitive price by getting some documentary evidence?

A I should presume our wholesale department did that, yes. I didn't do it myself because I didn't have those accounts.

Q Now, did you ever, either before or after you submitted Borden's final quotation to Elmer Schmidt, did you ask him or anyone from A & P how Borden's bid compared with the competitive offer?

A No.

Q Did you ask the identity of the competitive offerer?

A Not in so many words, no.

Q You tried to find out indirectly, is that it?

A Yes.

Q Now, I think you have testified that you not only did not ask Mr. Schmidt about how your bid compared with the competitive bid, but that he never volunteered that information, is that correct?

A Well, only in themanner in which I have testified.

One time he said, "You are not in the ball park. You are way off." And 50,000 wouldn't make it.

Q I will come to that.

A And all these other kind of things which would give you some inkling perhaps of what was going on.

Q But that $50,000 remark was the only clew you had?

A Well, no. There were others. Particularly towards the end when he said "Sharpen your pencil a little bit."

Q I am going to come to that.

Now, you didn't answer the question, however, that I had previously posed and I would like if his Honor would pleas instruct the witness to try and be responsive to the question asked. I would like the question repeated.

MR. WHITE: I think the answer was responsive. If your Honor is going to be asked to rule on it.

JUDGE HINKES: Let's hear the question and answer.

(The record was read by the reporter.)

MR. MC INERNEY: I think that is the kind of question that can be answered yes or no.

By Mr. McInerney:

Q May I put that question to you again, Mr. Tarr, as to whether Mr. Schmidt ever volunteered to you what the competitive offer was?

A No.

Q Now, you did try to get a clew from him as to what the competitive offer was, is that correct?

A Yes.

Q Did he ever in any way suggest to you what the Borden quotation should be?

A No.

Q In any way at all?

A Well, only by inference, as I testified before. But if the answer is yes and no, inference isn't the whole thing and I will say no he didn't.

Q Well, now, let me read to you from your deposition of December 2, 1971.

MR. MATHIAS: What page please?

MR. MC INERNEY: 511, it commences toward the end page 511 and goes through the top of page 513.

"Question: Now when you made this final quotation and when I speak of final quotation I mean it is $120,00 saving over -- prior to your making that offer did Mr. Schmidt in any way suggest to you what your quotation these events and what was said precisely.

A I don't.

Q You would agree that you do not?

A That is right. In many instances I don't, but in those things I answered definitely, why that is the way it was.

Q WEll, have you, for example, had anything come to your attention since the last time you testified in your deposition up to today that has reminded you of the phrase, "Sharpen your pencil"?

A No. I knew that all the time. This wasn't a recall from something I finally didn't remember before.

Q You just never testified to it?

A If the thing had come about that way, I would have testified to it, yes. I mean, I was asked this time about everything -- you see these things, when I reported about $50,000 was the only thing, this was before Mr. Minckler and I went over on the $820,000 deal.

This thing that I say about sharpening the pencil was just toward the very end of the thing. It was after all these things had been talked about and before we brought over the final papers.

Q Did you mention it to Mr. Minkler?

A Yes, Mr. Minkler knew all about it. Mr. Malone knew about it. They all knew about it.

MR. WHITE: Yes.

JUDGE HINKES: Well, then, shall we say that if the notes are not received, then, by Mr. McInerney one week from today that we can assume there are no such notes?

MR. WHITE: Well, I will report, Your Honor. As soon as I get back I will report on it.

JUDGE HINKES: Very well. That is fine.

MR. WHITE: We don't need to depend on my lack of saying anything to determine whether or not we get the notes.

MR. MATHIAS: Your Honor, I would take it that since there has been a specific request by A&P that these notes would be made available to Complaint Counsel as well since we were not aware of the existence of any such notes in the event they are made available to A&P Counsel.

MR. WHITE: They will be available to all three paties.

JUDGE HINKES: Fair enough. We'll have a report, then, from you when we resume next week, I hope.

MR. WHITE: Yes, Your Honor.

JUDGE HINKES: Very good.

You may continue, Mr. McInerney.

ByMr. McInerney:

Q Now, did readingthose portions of the transcript that were shown to you, Mr. Tarr, refresh your recollection that in arriving at this $820,000 quotation the only clue that you had was this reference to $50,000 savings or possible savings by elimination of in-store promotion?

A Yes, but that was only a drop in the bucket.

Q I am sorry?

A The $50,000 was only a drop in the bucket as I testified.

Q And that was the clue that you were working with when you came up with the $820,000?

A This is right; this is correct.

Q Now, I think you have told us that Elmer Schmidt never suggested what your final quote should be; is that correct?

A That is right.

Q The reference that you had made before to some kind of a price change that may have had some connection with this remark about sharpening your pencil, that was to ~~buy~~ by- products, wasn't it?

A It was a differential. It was a differential on the thing -- you mean the changes that were made, if any, yes, it was on the by products, any changes.

Q Now, the actual final offer that was submitted to A&P supposedly resulted in a cost saving to A&P of $820,000; isn't that correct?

A I am not sure but I think so.

Q Mr. Tarr, the $50,000 saving to which you referred, I think you said that that was a figure suggested by Mr. Elmer Schmidt; is that correct?

has made I am happy to have.

JUDGE HINKES: Very well.

By Mr. McInerney:

Q Now, Mr. Tarr, when ---

JUDGE HINKES: Pardon me. Just for the record, I think we should state that the document in question is not being submitted at this time. Permission is granted to Mr. McInerney to submit a copy of the pages which have been received in evidence and you will do so, I presume, Mr. McInerney, within the next week or ten days?

MR. McINERNEY: Oh, yes.

JUDGE HINKES: Very well.

By Mr. McInerney:

Q Mr. Tarr, when you submitted your final quotation to A&P, did you feel that Borden actually had to meet or beat the prices being offered by the competitor?

A Did I feel at the time we brought the figures over I thought we met them? Probably. I don't know as I had any feeling about whether we had to meet them. I was quite sure this is apparently what Mr. Schmidt had been trying to arrive at.

Q Well, y question was: Was it your feeling that you actually had to meet those prices being offered by the competitor?

A You mean prior to that time?

Q At any time.

A Well, I never felt that we were going to lose the business. I felt that somehow we were going to keep the business. I felt a little confident at that stage of the game that we would.

Q Well, my question, Mr. Tarr, was: Whether in giving your final quotation ---

A At that time?

Q In giving your final quotation for private label milk to A&P, did you feel that you actually had to meet the competitor's quote?

A Had to beat the competitor's quote? No, I didn't.

Q I am sorry. I didn't hear something.

A I didn't feel that we had to beat the competitor's quote.

Q I used the word "meet".

A "Meet". Well, I don't think I had any feelings along that line at all. I thought this was it. This was what we had arrived at. I didn't feel -- I think prior to that time I felt perhaps that we didn't have to meet this but I thought we were meeting it.

Q Didn't you feel that you didn't have to actually meet the competitor's quote but only come close to it?

A Well, I thought if we were close to it it would be all right, yes.

Q So is it your testimony that in submitting this private label quotation to A&P you did not feel that you had to actually meet the competitor's quote?

A Well, I don't imagine --- perhaps we did have to actually meet it. We had to be right up there.

Q But you thought you had some leeway?

A Possibly, yes.

Q Well, is it possibly or do you recall that you didn't feel that you had to actually meet ---

A Well, you are asking how I felt. Now, at that time I felt that we had met the proposition, that we were at least as high as the other party, and that there was no problem left.

Now, that is how I felt. You are asking how I felt at that time. There were times prior to that in the discussion, all this discussion, when I felt perhaps if we didn't get quite up to the bid that we would still retain the business but at that time my feelings were that we had met it so I can't quite follow your question.

Q My question is very simple. It is whether at the time you submitted the final quote you felt thatyou actually had to meet the competitor's quote.

A I felt we were meeting it.

JUDGE HINKES: Well, did you feel you had to, not that you were or were not, but that you had to?

THE WITNESS: Well, no I didn't feel -- if I

Q And when you submitted that, did you not know what the relationship was between the Borden offer and the competitor's offer?

A That is right.

Q Now, did you ever consider getting a letter from Elmer Schmidt or from somebody at A&P with respect to what the competitive offer was?

A No, I didn't expect to get anything like that.

Q Did you consider inquiring, either at the time that you submitted the final offer or after that, with respect to what the relationship was?

A No.

Q That wasn't even considered internally within the Borden organization?

A As far as I know it wasn't.

Q Now, did you or anyone in your presence ever mention to Mr. Schmidt or anyone from A&P that the private label quotation was not cost-justified?

A No.

Q Did you or anyone in your presence ever mention to Mr. Schmidt or anyone from A&P that these prices would not be made available to others?

A No.

Q Did you ever, in your discussions with Mr. Schmidt, refer to the Robinson-Patman Act?

A No.

Q And did anyone in your presence ever refer to the Robinson-Patman Act in discussions with anyone from A&P?

A No.

Q Did Mr. Schmidt at or around the time of the submission of this final quotation ask you for a letter stating in words or substance that these prices would be made available to others?

A No.

Q Are you sure of that?

A Yes, I'm sure of that.

Q Did he ask you for any kind of a letter or assurance from Borden?

A Well, there was something asked. I can't remember where this thing came from, but there was a letter written. It wasn't that it would be available to everybody.

Q What was it?

A I just can't remember the letter. The letter has been used in open testimony here in the last deposition I made and it was shown to me and it was my signature.

I didn't author the letter. I don't know who did.

Q I will show you that letter in just a moment but ---

A But maybe that is what you have reference to and someone, I am quite sure someone asked for it and I don't know whether Elmer Schmidt did.

going over to Mr. Schmidt, this was a thing that happened two or three times a week, sometimes where I will be over there at headquarters.

They asked for many things. They wanted quite often reports on this and that and the other thing. Presumably Mr. Schmidt or someone asked me or maybe they asked Mr. Minkler or maybe someone else.

I don't know -- and I don't know who wrote it. I have testified that way. I just know that I signed it. I do know that if I signed the letter to A&P I took it over there.

I have read the letter and I can remember something like that that was done. I can't remember the time I brought it over or anything else.

Q But how can you be sure that this was not a subject that you discussed with Mr. Schmidt at the VFW hall meeting?

A Because I remember everything in that VFW hall. That was the most important meeting we had in the entire year. That was the time when things were concluded. I can't remember the words that were used but I remember -- there isn't anything that was said at that meeting that I don't remember.

I haven'tsaid everything that was said at that meeting. I haven't tried to recall everything that happened at that meeting for your benefit or anybody's benefit.

letter, Mr. Tarr.

A I didn't write the letter.

JUDGE HINKES: Did you intend to convey any message to A&P when you signed that letter?

THE WITNESS: I only signed it because this is the letter that was apparently supposed to go over to A&P. It was prepared for me by somebody.

JUDGE HINKES: Did you know the content of the letter when you signed it?

THE WITNESS: Yes.

JUDGE HINKES: Very well now. If you knew the content of the letter, then I think that you ought to be in a position to know your intentions with respect to sending it to A&P, which you, of course, are responbile for.

THE WITNESS: I think it was in answer to a request that A&P made to us, someone in A&P made to us to -- I don't know what they asked for exactly ---

JUDGE HINKES: Well, let me put it to you this way: Was it your intention to comply with the wishes of A&P?

THE WITNESS: Yes.

JUDGE HINKES: Very well.

You may continue, Mr. McInerney.

MR. McINERNEY: Well, Your Honor, I would prefer to have the witness tell us in his own words what that inasmuch as the document has not yet been offered or received in evidence.

MR. MATHIAS: That is right, Your Honor. I will make an offer at the end of my questioning, and I believe basically the document speaks for itself.

JUDGE HINKES: Very well.

Borden/Bowman

By Mr. Mathias:

Q Now, Mr. Walker, in the course of these proceedings, three A & P officials, Messrs. Herschel Smith, Elmer Schmidt, and Ira Bartels, have testified that upon urging of A & P Counsel, and within a few months of the trial herein, they had re-reviewed the Bowman and Borden offers to A & P of 1965. They also testified that they now found that they had been in error in 1965 when they determined that Borden was the lowest bidder in that they had not noted the fact that the Bowman offer was based on 3.5 percent butterfat milk, while the Borden offer was for 3.4 percent butterfat milk.

Are you familiar with that testimony, Mr. Walker?

A Yes, I am.

Q Well, since that testimony was given, Mr. Walker, have you reviewed the Bowman offer to A & P as contained in Commission Exhibit 50 and Commission Exhibit 263 with various subparts?

A Yes, I have.

Q Now, Mr. Walker, through your study of the Bowman offer, have you been able to determine the butterfat content of the homogenized milk in gallon, half-gallon, and quart containers as included within the the Bowman offer?

A No.

Q Why?

A Because the bid does not specify the butterfat content of this product, and there is no information in the exhibit that will allow me to determine the butterfat content of the homogenized milk.

Q Now, Mr. Walker, I would like to place in front of you a page of the Bowman offer which is identified in the two exhibits and Commission Exhibit 50, it is Commission Exhibit 50-C, and at Commission Exhibit 263, it is Commission Exhibit 263-E. It is the identical page in each.

MR. FALLS: 50-C?

MR. MATHIAS: 50-C, and 263 E. They are identical in either one.

By Mr. Mathias:

Q Now referring you to this page of the Bowman offer, which is entitled, "Price Escalation on Milk Order Prices", the offer states as follows: This is in part. "Chicago Area prices are quoted on the basis of the present order number 30 price, plus a superpool, which totals $4.32 per hundredweight for 3.5 percent Class I milk products." At another portion similar raw milk cost data for "3.5 percent Class I milk products" is given for the Iowa Federal Order Area.

Now, calling your attention to the data on this page of the Bowman offer, Mr. Walker, how does this information comport with your stated opinion that the Bowman offer does not include information which would reveal the butterfat content of the relevant homogenized milk under this offer?

MR. FALLS: I object, on the grounds that Mr. Mathias is asking the witness to interpret this language, if I understand his question, and I think the document speaks for itself.

JUDGE HINKES: Well, the witness has stated that he cannot establish the existence of a 3.5 percent butterfat content from the exhibit that has been received in evidence, and he is now being asked to explain his answer. I think that is appropriate. I will have to overrule the objection.

THE WITNESS: The 3.5 percent referred to in your quotation deals with the butterfat content of the basic milk for these two order areas. The basic price and butterfat content here stated deals with the raw milk and it is the cost of the raw milk as it is paid to the farmer by the handler for milk used in Class I products. Now, obviously, in skim milk which has little or no butterfat, and on the other hand whipping cream, which has approximately 32 to 35 percent butterfat, are Class I milk products, and they have no relationship to the butterfat content of the basic raw milk in the payment to the farmers.

By Mr. Mathias:

Q Now, Mr. Walker, have any other facts come to your attention which would have a bearing on the butterfat content of the regular homogenized milk under Bowman's offer?

A Yes.

Q Please tell us what these facts are, and what bearing they have on such butterfat content.

A Well, first, Bowman bid exactly the same price for the homogenized milk under the Bowman label and the A & P label. Second, Mr. Schmidt testified that they did not make any specific requirements as to the butterfat test, other than that of the meeting the minimum legal requirement in the Chicago area. The minimum legal requirement for the City of Chicago was 3.25 percent butterfat. Then in addition, I reviewed the handler's reports for the period January, 1965 through March, 1966. On these ---

MR. FALLS: I object, Your Honor. Are those in evidence?

MR. MATHIAS: No, they are not, but they are present here for review. Respondents have been notified of the fact that they are available, and they have been supplied copies and notified that Mr. Walker will give his opinion based upon these. I do not want to offer them in evidence because I think it would be a burden on the record to put conclusion --

MR. MATHIAS: Your Honor, this is additionally. This is additional data of his analysis of the Bowman offer.

JUDGE HINKES: Yes. And it would appear to me at least that his answer is permissible, whether or not the documents upon which he bases his answer are received in evidence or are receivable in evidence. In addition, I am not at all sure that these documents have not been sufficiently authenticated for that purpose, but whatever the reason may be, I must overrule the objection and allow this testimony to stand. I am not sure however that the reporter got the complete answer of the witness inasmuch as it was interrupted by the objection of Mr. Falls and it may not be complete.

MR. MATHIAS: Your Honor, maybe it would be best if I re-put the original question to the witness and he went through so we have it all together in one spot rather than broken up over 15 or 20 pages of transcript.

JUDGE HINKES: Yes, I think you should do that and let's have it concise.

THE WITNESS: Could I have the question again, please?

By Mr. Mathias:

Q Well, to briefly review, Mr. Walker, I originally asked have any other facts come to your attention which would have a bearing on the butterfat content of the regular homogenized milk under the Bowman offer. You replied yes. Now I have asked you to please tell us what these facts are and what bearing they have on such butterfat content.

A First, the fact in the bid that the Bowman and A & P label was being offered at the same price or cost to A & P. Second, Mr. Schmidt testified that he did not ask for any specific butterfat content for the homogenized milk beyond the legal requirement. Third, in the Chicago area, in the city of Chicago, the minimum butterfat requirement is 3.25 percent. And fourth, in reviewing the handlers reports for Bowman and for Borden for the period of January, 1965 through March of 1966, I discovered that the butterfat test of the milk processed by Bowman and submitted to the Milk Market Administrator indicated a lower butterfat test than that on the Borden handlers reports. It is therefore my conclusion that had Bowman received the bid the butterfat content in the milk supplied by the Bowman Company would have had a lower butterfat content than that actually supplied by the Borden Company.

MR. MATHIAS: Now, Your Honor, I would offer CX 206A through D in evidence. In doing so, though, I want to note one thing which I believe is quite important. In our pre-trial discovery in this matter we made an official demand on the Borden Company for its profit and loss data for the Chicago area for the years 1964, '65 and '66 as well as additional years, and in response to that demand Borden replied that such

I just wanted to have the dates of those requests and responses in the record so there would be no confusion.

VOIR DIRE

By Mr. Schaeffer:

Q Now, Mr. Walker, Commission Exhibit 206 A through C as I read them show some figures and some information which does not appear on 206D. Could you tell us the source in particular for the figures you show on 206A through C as "sales volume (pounds)"?

A Yes. The pounds shown on A through C are computed from the points shown on 206D. For example, on 206D, January, 1965, indicates 17,441,352 points. This number is multiplied times 2.15, the weight of a quart of milk. The testimony in this record as well as industry practices are such that a point is equivalent to one quart of milk and a quart of milk weighs 2.15 points. Thus the points are converted into pounds for your sales volume lines on CX 206A through C.

Q Mr. Walker, in that conversion -- excuse me. Do you have anything further to say about the sales volume pounds entry? I didn't mean to interrupt you.

A I didn't know whether you wanted me to go on on what other calculations were made.

Q Let's treat those separately if we can.

A All right.

Q The conversion factor of 2.15 which you applied is a factor

A Of what?

Q Administrative expense.

A Yes.

Q No allocation there either?

A No. Again I would like to caution you, even with butter it is a relatively small item. You understand this.

Q Is cottage cheese a small item?

A No, that is a fairly good item, but it would still be overshadowed by the milk Class I product.

Q Now, directing your attention, Mr. Walker, to December of 1965 as shown on CX 206 B.

A Yes.

Q December.

A Yes.

Q If you take a look there at the cost product sold in unit amount per hundredweight, there is a number of $5.74, is there not?

A Yes.

Q And that number is, I believe, significantly less than the cost of product sold per hundredweight for any prior month of 1965, is it not?

A Yes.

Q Do you know why that is?

A Yes.

MR. MATHIAS: If the witness knows the answer, it

is all right.

By Mr. Falls:

Q Tell us, please.

A It is due to a procedure that Borden has of giving credits to the individual plant operation from the headquarters in December to correct for overcharges or overall occasions made during the year in terms of headquarter expenses and credits from items purchased whereby the Borden Company has a national purchasing contract.

Q Well, by reason of the necessity for those year-end credits, would it not be true that the cost of products sold for the preceding months of the year would be overstated?

A To the extent that there has been such adjustment in December.

Q In other words, one would have to take account of the year-end adjustment in order to come up with an accurate figure for the cost of products sold for any particular month?

A For the full year, yes. In other words, you would have to make the adjustment each month throughout the whole year.

Q Right, and until such an adjustment had been made there would be an overstatement of the cost of products sold for the particular month.

A Yes.

Q Do you know whether that parenthetical figure for advertising expense in December is the same sort of thing?

A Yes.

Q It is a year-end adjustment?

A Yes.

Q And until that adjustment is applied in some fashion to the preceding monthly figures those figures would be overstated?

A Yes.

Q Now, directing your attention to the cost of products sold for the eight months of 1966 that are reflected on CX 206 C, is it not the fact that the cost of product sold during that period increased significantly as against 1965?

A Yes.

Q Do you know whether that cost of product sold increase was attributable in part to increasing raw milk prices?

MR. MATHIAS: Your Honor, again I would ask that the witness be instructed if he does not know specifically, the speculation is of no use to this record.

JUDGE HINKES: Yes, we don't want an opinion at this point, Mr. Walker, but a factual response, if you have one.

THE WITNESS: I don't know for certain.

By Mr. Falls:

Q You don't know whether raw milk prices increased in 1966 in this area?

on inclusion of the prices with respect to glass gallon jugs, and I want it to be clear in the record that you are not offering this witness to say anything about that area of comparison.

MR. MATHIAS: That is correct. I believe if you will examine the direct examination there was not one single mention of glass gallon jugs.

MR. FALLS: All right.

By Mr. Falls:

Q Let me turn to another subject, Mr. Walker. You gave some testimony this morning with respect to your inspection of certain handlers reports.

A Yes.

Q Insofar as they related to the butterfat content of the Bowman and Borden milk?

A Yes.

Q And what was the period again as to which you testified?

A January, 1965 to March, 1966.

Q And I believe you said you concluded that the Bowman milk had a lower butterfat content than the Borden milk?

A As far as the regular homogenized milk is concerned.

Q When you say that do you mean average butterfat for Borden over that whole period was higher than for Bowman over the whole period, or something else?

A Each month the reports indicated that the Borden butterfat test was higher than Bowman's.

Q So this was not based on an average but this was looking month by month?

A Each month.

Q Well taking let's say June of 1965, for an example, can you put before you the handlers reports on which you relied and show us just in what manner -- talking now about the Bowman handlers reports. Well, the Bowman and Borden handlers reports. I just want to understand how you arrived at that conclusion.

MR. MATHIAS: Your Honor, it will take us a few seconds to get out the Borden handlers reports. I think you wanted me to look at that too, did you not?

MR. FALLS: Let's have everything of June of '65 that he referred to.

I want to be sure that I have the documents that the witness has so that I can inquire about this comparison.

MR. MATHIAS: Well, you might come over and take a look.

MR. FALLS: We probably have copies, don't we, of the things he is looking at?

JUDGE HINKES: Off the record.

(Discussion off the record.)

JUDGE HINKES: Let's take a short recess now while the papers are collected.

(A brief recess was taken.)

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the Bowman Dairy Company.

Now if Mr. Falls wishes to ask Mr. Walker how he knows that they are such, well, that might be a possible subject of cross-examination, but I believe both as to question of authenticity and the admissibility of Mr. Walker's testimony in any event, I believe your ruling was absolutely correct this morning, and there has been nothing brought up now that shakes that ruling.

JUDGE HINKES: I do believe that I should for the sake of consistency, if nothing else, overrule the objection that has been raised to Mr. Walker's testimony insofar as that objection is based upon inadequate authentication of the Bowman handler reports.

By Mr. Falls:

Q All right. Mr. Walker, now referring to the Bowman document, which is the butterfat figure that you took there to make your comparison?

A I took the butterfat test shown opposite the homogenized vitamin D milk. The particular sheet that I am looking at has a heading on ~~the~~ its Capital, one of the parts, one of the dairy parts of the Bowman Company and it indicates that butterfat test of 3.3732. Now the decimal point is a little bit confusing on this particular document. The document following that --

Q Actually what the document says is 33.732, is that right?

A That is right, and the document following that says

3.3732.

JUDGE HINKES: Do you think it is just a misplaced decimal point?

THE WITNESS: Yes, and I might add the percent column indicates a 20.159, so I think that is a fair statement.

By Mr. Falls:

Q That suggests these handlers reports are not always prepared with perfect accuracy, I would note.

A Well, the numbers may be accurate, but the decimal points may not be.

Q You are not excluding the possibility of other mistakes are you, Mr. Walker?

MR. MATHIAS: Your Honor, I would object to speculation.

THE WITNESS: Anything is possible.

By Mr. Falls:

Q The sheet to which you first referred has "Capital" up in the upper left-hand corner.

A That is correct.

Q And you say that is the milk supplied by ---

A That was processed by Bowman and reported to the handler as part of the Bowman operation. I might add sometimes in these reports you will also find a Model Dairy, and also a Bowman total. In each case the butterfat content was exactly the same regardless of whether it said Bowman, Bowman total, Model, or Capital on the particular month.

Q Now, looking at the Borden sheet, which was the figure that you used?

A With respect to the March, 1965 sheet I used the top line which is the regular homogenized milk, and it indicates a butterfat test of 3.44771.

Q And with respect to the other months as to which you testified you made the same sort of comparison, you did it essentially the same way, is that it?

A Yes.

MR. FALLS: That is all I have, Your Honor.

JUDGE HINKES: Very well, Mr Schaeffer.

MR. SCHAEFFER: I have just one question.

MR. MATHIAS: Your Honor, will this be in connection with the question of the butterfat or the Bowman ---

MR. SCHAEFFER: Oh, my, no.

MR. MATHIAS: Okay. Fine.

MR. SCHAEFFER: I am glad you clarified that.

This is by way of general cross-examination on the early part of Mr. Walker's testimony with respect to Commission Exhibit 206.

By Mr. Schaeffer:

Q Mr. Walker, just to make sure that there is no

President of the division at that time.

JUDGE HINKES: The President of which division?

THE WITNESS: Of the MIddle Western Division. It was the Middle Western Division at that time.

JUDGE HINKES: You mean that Mr. ~~Peers~~ Pearce and Mr. Lewis then reported to the President of the Middle Western Division from their positions in the unit?

THE WITNESS: Right.

By Mr. Stone:

Q When you became Sales Director of the Chicago Division, did you have any responsibility to make any kind or report to the New York office?

A No, sir.

Q Now, Mr. White, how many people were under your authority during your tenure as Sales Manager of the Chicago unit, approximately?

A About 18 or 20.

Q And what were their functions?

A I had clerical girls in my department, I had sales representatives who worked with the field, I had an advertising department, I had a price desk department. I think that would just about cover it.

Q And in connection with the function which you mentioned of setting prices, pricing the products, were you responsible for the setting of the general prices of all the products A&P sold in the Chicago unit?

A Yes, I was.

Q And did the store manager of the Chicago unit have the authority to unilaterally set prices?

A No, sir.

Q So tell me how you went about setting prices during this period in a general way.

MR. CURNIN: Are we talking about all products that are sold out of A&P stores in the Chicago unit?

MR. STONE: Yes.

MR. CURNIN: Is this relevant, Your Honor?

JUDGE HINKES: Well are you objecting on the grounds of relevancy?

MR. CURNIN: I am objecting on the grounds of relevancy. My understanding is that A&P sells maybe 8,000 items. We will be here for a long time if we have to discuss this as to each of these items.

MR. STONE: Your Honor, I asked him about his procedure in setting prices.

JUDGE HINKES: For all items?

MR. STONE: For items in a general way.

JUDGE HINKES: Is there any need for that?

MR. STONE: I think there is a need to establish the general procedure utilized by the Atlantic and Pacific Tea Company in setting prices for the Chicago area.

MR. CURNIN: I thought the subject here, Your Honor,

By Mr. Stone:

Q Now, did your office in all cases set prices in the Chicago unit?

A Yes, sir.

Q Mr. White, I hand you Commission Exhibit 256-A through Z-28, which appears to be a document entitled the Great Atlantic and Pacific Tea Company and at the left hand corner "price list" the typed word "Chicago" and the printed word "unit".

Can you identify these documents, Mr. White?

A Well, I could not positively identify them. I would say they look like they might be our price pages, yes. It looks like the format that we used at that time. I did not handle the price pages personally nor did I assemble this information to be submitted so I couldn't positively identify them but I would say they look like they are ours.

Q Were these documents assembled under your direction or the direction of your office?

A Under the direction of our office but NOT under my direction.

Q When you say assembled or words to that effect, are you referring,strike that.

To clear up any confusion there may be,were these price book pages prepared originally under the direction and auspices of your office?

MR. CURNIN: Objection, Your Honor. The question

A Yes, sir.

Q Were the prices at which A&P sold prices advertised by A&P in the newspapers in these two areas?

MR. CURNIN: Products generally?

MR. STONE: Yes.

THE WITNESS: Please repeat the question.

MR. STONE: Would the reporter please read the question?

(The reporter read from her notes as requested.)

THE WITNESS: I don't understand the question.

MR. STONE: Perhaps I can restate it.

By Mr. Stone:

Q Were the prices at which A&P was offering various products for sale advertised by A&P in the two areas I have mentioned?

MR. CURNIN: Objection on the grounds of relevancy, Your Honor.

JUDGE HINKES: Yes. Here, again, I don't know if youwant to get into the entire line of products that A&P carries. Let's limit it if we can.

By Mr. Stone:

Q Did you advertise milk and dairy products on occasion in these areas?

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A We could have advertised dairy products, yes. Dairy products, yes, we could have advertised dairy products.

Q Did you advertise milk?

A We might have. It was not usual for us to advertise milk.

Q Did you advertise A&P's private label products in the area?

A I am sure we did, yes.

Q What media did you use for these advertisements?

MR. CURNIN: Your Honor, if we were talking about advertising of something other than milk and dairy products I would object.

JUDGE HINKES: I presume that the question is limited to the milk and dairy products which was the subject of your previous questions?

MR. STONE: Your Honor, I have tried to comply with Mr. Curnin's objection but I think we are talking about A&P's general advertising practices here and I think that two questions or three questions will clear this matter up.

JUDGE HINKES: Is there any reason why we want to go into their general practices?

MR. STONE: I think he has already stated A&P's private label products were advertised and as we have seen before they constitute a broad line of products.

MR. SHAEFER: Your Honor, I would object to that if only -- my understanding of that question, the line of questioning was directed to milk and dairy products and when the witness said he was sure A&P private label products were advertised I understood that question to be in that same line of questions relating to milk and dairy products.

JUDGE HINKES: Of course it is open to some construction. I think we ought to get the answer from the witness.

When you spoke of the advertising, Mr. White, of private label products what were you referring to?

THE WITNESS: Your Honor, I was really referring to the introduction of the private label milk.

JUDGE HINKES: I see.

MR. STONE: Your Honor, in this case I would like to go further. I would note that the legal issue involved here is whether or not A&P was competing in this areas on that ground. I think I have the duty and obligation to ask a few questions in this area.

JUDGE HINKES: Again, is this case concerned with competition in the sale of pepper?

MR. STONE: I think it is concerned with the question of whether or not A&P competed in the broad line of its sales in these two specific areas.

MR. CURNIN: Your Honor, we would strongly object to that. That is not an issue in the case and it has never been defined as being an issue in this case and if we are going to get involved in the competitive aspects of A&P's

By Mr. Stone:

Q I will split the question and ask first, sir, do you recall advertising by the Great Atlantic & Pacific Tea Company in the newspapers circulated in the City of Chicago or the Cities of Gary and Hammond or Valparaiso relating to the sale of milk products during your tenure as sales manager?

A I don't specifically recall any ads that we ran on milk products during that period. We well could have run ads at the time we introduced private label milk. I don't know that we did but it is possible that we did.

JUDGE HINKES: Is it probable?

THE WITNESS: It would be more probable that we did in Chicago than others, Your Honor.

JUDGE HINKES: Is it improbable, then, that you did it in the others?

THE WITNESS: It could be improbable, yes.

MR. CURNIN: Your Honor, I think we are getting into a confusing area with the witness as to what is possible and what is probable, and is it more probable here and less probable there. I think his testimony as to what is possible and what is probable should be stricken.

JUDGE HINKES: It is denied. That is the purpose of my question. Anything is possible but when the witness tells me that it is probable, that is a different story.

By Mr. Stone:

Q Mr. White, did A&P also advertise its private label products in the newspapers circulated to Chicago and the Gary-Hammond area during your tenure of employment as sales manager?

MR. CURNIN: Objection, Your Honor, unless we know what private label products we are talking about at this time.

JUDGE HINKES: Would you specify.

MR. STONE: Any products on the private label.

MR. CURNIN: Continuing objection, Your Honor.

THE WITNESS: Do you mean milk products, Mr. Stone?

MR. STONE: No. Any private labels.

THEWITNESS: Yes, we would have advertised private labels.

MR. CURNIN: Your Honor, I note if this concludes this line of questioning -- I do not wish to interrupt this line of questioning -- but I would like to note that the witness has beenon the stand for an hour and 45 minutes.

JUDGE HINKES: I was thinking we could just go on for another 15 minutes and break for lunch. But if you would like to have a recess --

MR. CURNIN: I can speak for counsel, Your Honor. I would like a recess, only, however, if we are through with this line of questioning. If not, I do not wish to interrupt him.

MRL STONE: We are through with this line of questioning.

[redacted]

Q Did you participate in any fashion in the negotiations between the A&P and Borden which led up to the arrangement which brought about the introduction of private label milk in A&P stores in the Chicago unit?

A I did not.

Q Did Elmer Schmidt or Ira Bartels at any time discuss or suggest to you what retail should be set on private label milk?

A No, sir.

Q Did either Mr. Schmidt or Mr. Bartels have any authority at all to enforce any suggestion with respect to the retail price of milk or other products sold in A&P stores in the Chicago unit?

A Would you please repeat that question?

MR. CURNIN: Would the reporter read the question.

(Question read)

THE WITNESS: Neither did because the responsibility for establishing retails rested with me as sales manager.

By Mr. Curnin:

Q Was that a result of a directive at the unit level or was it a matter of company policy?

A It is a matter of company policy.

Q And would you explain just what is the company's policy in regard to the responsibility of the sales manager for fixing retails on products sold out of A&P Stores?

A It is the sales manager's responsibility to establish all retails for all merchandise sold. Although he might not do all of this himself, he is responsible for the final approval.

I might add in the case of milk I set the retails on milk myself.

Q Did you set the retail at which A&P's private label milk and dairy products would be sold out of A&P stores in the Chicago unit during the period 1965 through 1968?

A Yes, I did.

Q What factors did you consider in establishing the retail and I ask you now to address yourself to the initial introduction of private label milk and dairy products.

A Mr. Curhin, are you asking me the basis for pricing as I did?

Q Yes, sir.

A I priced the milk and the by-products at the same retails that we currently were selling the Borden brand for.

Q And would you tell us your reasons for doing so?

A There had been a precedent set whereby a competitor introduced a private label milk at a lower price than the ~~outside~~ Advertized brand which he carried which resulted in the market meeting that lower price. Later the competitor raised that retail back to the ~~outside~~ advertized brand price. I felt the precedent had been set that if I set a retail lower than the ~~outside~~ advertized brand it would be followed down in the market.

Q Can you identify for us the retail that you have reference to and what point of time this occurred.

A The retailer was Jewel Tea Company and the time wasin the mid-50s.

Q What was the name of the private label milk product that they introduced at tha time?

A The item that they introduced at that time was called Yummy.

Q What are the benefits of private label milk and dairy products as you see them, Mr. White?

A There are several benefits. No. 1, the opportunity is there to increase your gross profit, providing the item sells; secondly, it gives you an item that only can be brought in your store and I believe third would be perhaps the flexibility that the buyers have in negotiating for milk.

Q At the time private label milk and dairy products were introduced in A&P stores in November of 1965, did A&P continue to carry Borden brand milk and milk products?

A Yes, we did.

Q And was it your decision to continue selling both the Borden brand of milk and diary products and A&P's private brand?

A Yes, it was my decision.

Q Did you make a determination at that time as to what the division would be in the dairy case, how muchh A&P milk and dairy products would be carried and how much of the Borden brand milk and dairy products would be carried?

A Yes, I did.

Q What was your decision at that time?

A Well, to play it safe we decided we would display on a 50-50 basis, 50 percent for the private label and 50 cents for Borden.

Q What were your reasons for fixing that as the ratio 50-50?

A It gave me the flexibility if the private label sold-- well I could expand the display space and if it didn't sell as well as we had anticipated we could reduce the space or completely eliminate it.

Q And did there come a point in time thereafter when that ratio was changed between the Borden label milk and dairy products and the A&P milk and dairy products?

A Yes.

Q Can you tell me approximately when that was?

A It would have been somewhere in six months to a year later.

Q Whose decision was it to change the ratio?

A It was my decision.

Q Now, can you tell us what that decision was and how you arrived at it?

A The decision was that we would expand our own and reduce te Borden label because the acceptance that we had for our private label was very good.

Q In setting the retail on A&P's private label milk and dairy products in Chicago did you receive any suggestions or insructions from A&P in New York?

A No, sir.

Q Did you have any discussions with Mr. Herschel ~~Schmidt~~ Smith as to what the retail should be on A&P's private label milk and dairy products prior to your setting the retail?

A I never discussed retails with Mr. ~~Schmidt~~ Smith.

Q During the period 1965 and continuously thereafter through 1969, did the A&P Tea Company have a policy regarding discussing retail prices with supplier?

A Yes, we did.

Q What ws that policy?

A Our policy was not to discuss retails with suppliers.

Q During the same period of time starting in 1965 and continuing through continuously through 1968, did anyone from Borden Company ever discuss with you or suggest to you the retail that should be set on milk sold in A&P stores in the Chicago unit?

A No, sir.

Q Did you ever discuss the retail prices, actual or proposed, on milk and dairy products with anyone from the Borden Company?

A No, sir.

Q Did Borden in any way influence the retail you established on private label milk at any time during this period 1965 through 1968?

going to occur with the introduction of private label milk and dairy products?

A Yes.

Q For what purpose?

A YWell, so they would know how many deliveries they were going to get, how many orders they would have to make out, how far in advance they would have to work. This would have to be known by the store managers.

Q Mr. White, I show you Commission' Exhibits in evidence 91 and 92 and I ask you if you have ever seen these documents prior to this morning.

A I has never seen the documents prior to this morning.

Q ONe last question, Mr. White.

To your knowledge did the Executive Committee of the Chicago Unit participate in any way in negotiations for private label milk and dairy products between A&P and Borden?

A No, they did not.

Q Did the executive committe participate in any way in your decision as to the price that would be charged for private label milk and dairy products?

A No, they did not.

MR. CURNIN: No further questions.

JUDGE HINKES: Mr. Schaefer.

MR. SCHAEFER: No questions, Your Honor.

JUDGE HINKES: Any redirect?

You may have reason to explore the possibility of further authentication, but failing that, you may renew your motion at a later time and a ruling will be made at that time.

As of this moment, I think that further authentication might be a preferable move on your part. In any event, I shall reserve my ruling on your motion.

MR. STONE: Thank you, Your Honor.

We have no further questions.

JUDGE HINKES: Is there anything else?

MR. CURNIN: Just a moment, if I may, Your Honor.

Just one question, Mr. White.

RECROSS-EXAMINATION

By Mr Curnin:

Q Did the A&P stores within the Chicago unit located in Iowa, did they receive private label milk and dairy products?

A No, they did not.

MR. CURNIN: No further questions.

JUDGE HINKES: Thank you.

You may step down.

MR. MATHIAS: Your Honor, we have sent for the next witness. He should be here in a few moments.

I wonder if we could take a break and let you know when he is here.

JUDGE HINKES: Very well, we will resume when he

PROCEEDINGS

JUDGE HINKES: On the record.

I believe that we have some witnesses scheduled for today, and you may present them, Mr. Curnin.

MR. CURNIN: We call Mr. John White, Your Honor.

--

JOHN WHITE was thereupon called as a witness for the Respondent, A&P Tea, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

MR. CURNIN: I note, Your Honor, Mr. White has previously been a witness in this case, called during complaint counsel's case, and that his prior testimony appears on pages 1983 through 2,097.

JUDGE HINKES: Thank you, in which case there is no need for a swearing, again. You may be seated. Let me just remind you you are still under oath.

THE WITNESS: Yes, sir.

By Mr. Curnin:

Q Mr. White, you have already testified as to your background and position, but to put it in context, would you tell us by whom you were employed during the period 1965 through 1968, and in what capacity?

A 1965 to 1968, I was employed by the Great Atlantic & Pacific Tea Company, and I was the Sales Manager of the

Chicago unit.

Q And as Sales Manager for the Chicago unit, did you have some responsibility for establishing retail prices out of A&P stores?

A Yes, I did.

Q During the period 1965 through 1968, did all of the A&P stores in the Chicago unit sell milk at the same retail or out of store price?

A No, they did not.

Q And there were therefore occasions on which some of the stores had different retails?

A Yes, there were.

Q What was the reason for that?

A If a Manager called and got permission to meet a retail of a major competitor, 5 or more stores, and that permission was granted, then he sold milk at a different price than the regular retail set for it.

Q When you say permission was granted, was that permission granted by you or your office?

A Indeed it was.

Q During the period 1965 - 1968, on a weekly basis, how many retail stores in the Chicago unit would be selling milk at a lower retail out of store price?

A 20 to 30 a week.

JUDGE HINKES: That is 20 to 30 out of how many?

THE WITNESS: Out of the 175 stores in the Greater Chicago area.

By Mr. Curnin:

Q Again, during the same period of time, Mr. White, what would the price reduction have been on the gallon package that would have been authorized by your office?

MR. MATHIAS: I would object to the generalness of that question -- what particular instance is he talking about?

JUDGE HINKES: I presume this was not a constant situation, Mr. Curnin, and you would have to specify the time or the instance to which you are referring.

By Mr. Curnin:

Q Lets take 1966, and we will break it down into quarters or half year periods, I think would be one approach to this.

Mr. White, in 1966, in the first half of 1966, can you recall the price reductions which you authorized on gallon packages during that time period to meet the competitive situations about which you have told us?

MR. MATHIAS: Your Honor, I would still object. It has not been shown, I mean, this was a uniform thing throughout each of those stores, where a reduction was made. I believe some foundation must be laid here.

JUDGE HINKES: He is not being asked for that foundation, as I see it. He is being asked to recall, if he can. We will go into more specifics after we find out whether he can recall.

THE WITNESS: I think, in answering that question, I would have to say that it would range probably from 4 cents a gallon to 10 cents a gallon.

By Mr. Curnin:

Q And the price reduction authorized on the half gallon package, what would that have been, Mr. White?

A Of course, that was less. It would probably run from 2 cents to 6 cents.

Q During the balance of 1966, July through December, what would the price reduction have been that you authorized in these stores?

A I would say it would be about the same.

Q In other words, it would be in the same price range you have given for the gallon and the half gallon?

A Yes.

Q In the year 1967, can you tell us what price range reductions you authorized?

A I really think it would be about the same.

Q What about 1968?

A The same.

Q When you authorized reduced retails in these 20 to 30 stores during this time period, did you receive from your milk supplier a reduction in the into store or wholesale price that was being charged to A&P?

A Yes, we did.

MR. MATHIAS: Your Honor, I would object to that question and ask the answer be stricken unless some foundation can be shown to indicate whether the witness knows whether or not he received a reduction in the wholesale price. There has been no showing Mr. White has any connection with the wholesale price, at this point.

JUDGE HINKES: It seems to me that is proper. We will strike the answer of the witness, but you may pursue it further, Mr. Curnin.

By Mr. Curnin:

Q If you know, during the period 1965 to 1968, what price A&P was paying its milk supplier for milk?

A Yes, I knew the price, the cost of the milk, at the time, yes.

Q Who was A&P's supplier during this time period?

A Borden.

Q When you authorized a price reduction to meet a competitive situation in those instances, did you receive any price reduction from Borden Company?

A Yes, we did. We received a price reduction.

Q And in what amount?

A The amount of the difference from our regular retail to the special retail to meet the competitor.

Q Let me see if I can give you an example, Mr. White. If you, for example, reduced the gallon price by 4 cents, in other words, you lowered your retail by 4 cents, in what amount would the Borden Company have lowered its into store price to you?

A 4 cents.

Q What was the dollar amount of the average weekly price reduction that you received from the Borden Company in 1965, and prior to November 1, 1965, when you had to reduce your retails because of the competitive conditions?

MR. MATHIAS: Your Honor, I would object unless there is some foundation for his knowledge here. We have had some very rough estimates here of price reductions, and it seems to me --

MR. CURNIN: I will ask that question, Your Honor.

JUDGE HINKES: Very well.

By Mr. Curnin:

Q In 1965, prior to November 1, 1965, did you know of the approximate dollar amount of the reduction which A&P received in its into store or wholesale price from Borden because of the competitive conditions that you had to meet in the Chicago unit?

A At that time, I was well aware of that, yes, sir.

Q And what was the amount of that reduction on a weekly basis?

A To the best of my recollection, I would estimate about $2700 a week.

Q Can you recall for us the date on which A&P switched from selling all Borden label milk and dairly products in its stores to private label products and Borden products?

A Around the 1st of November 1965.

Q After November of 1965, when you had to meet these competitive conditions that you told us about, did you continue to receive a reduction in the into store or wholesale price from Borden on those occasions?

MR. MATHIAS: Your Honor, I am going to object to the record at the present time as being to the effect that from 1965 to 1968, that A&P received price reductions to meet competition, and that the approximate dollar -- weekly dollar value of these price reductions was $2700 a week. Your Honor -- excuse me -- I have been corrected. As to the weekly dollar value of this price reduction that was limited to 1965, but the prior testimony elicited, as to the fact of the price reduction applied to 1965 to 1968.

Now, it would appear that Mr. Curnin is going to impeach, in some way, this prior testimony by Mr. White.

JUDGE HINKES: I don't know if we can anticipate that. The question that is pending is simply whether or not this witness knows of the price reductions that were in effect, if any, after November 1965. I think that question can be answered. We will go on from there. Do you want to have the question repeated?

THE WITNESS: If you would, please, Your Honor.

(The pending question was read by the reporter).

THE WITNESS: No, we did not.

By Mr. Curnin:

Q Why was that, Mr. White?

A That was a part of the agreement in the purchasing of the milk, that we would not receive it.

Q Was that the agreement to purchase private lable milk?

A Yes.

Q One of the conditions was you would no longer receive a reduction in the into store price from Borden when you, A&P, reduced your retail prices to meet competitive prices?

A That is right. We were not going to receive any further allowances from Borden to meet competitive situations, and that was clearly understood between my Buyer and me.

Q Prior to November 1, 1965, those weekly reductions amounted to approximately $2700 a week?

A Yes, sir. That is my best testimony.

JUDGE HINKES: Mr. White, was your failure to receive any price reductions from Borden after November 1965, applicable to private label only or to private label and Borden label, or just to what?

THE WITNESS: Private label only.

By Mr. Curnin:

Q Following up Your Honor's question, and according to the agreement, the agreement was you continued to receive a reduction on the into store price on Borden label products when you lowered your out of store price to be competitive?

A Yes, we did.

Q The loss was only in connection with the private label?

A Yes, that is right.

Q During the period 1965 to 1968, Mr. White, were you aware of the ratio of expense to total sales in the Chicago unit as compared with other units of A&P?

A Yes, I was.

Q And how did the ratio of expense to total sales in Chicago compare with these other units?

MR. MATHIAS: I am going to object on 2 grounds. First of all, this is quite obviously getting beyond milk, plus it goes beyond the statement of the intended testimony to be taken from Mr. White. I will read, as follows -- make sure I read completely the proposed testimony from Mr. White, as identified in A&P's witness list, supplemental proposed witness list filed February 11, 1974.

"Mr. White will be questioned regarding retail price reductions authorized by him during the period 1966 one method of operation and would have been for the Albany area.

O I show you a document marked Respondent A&P Exhibit 63, for identification, and ask you if you can identify that document for us, sir?

A Also, with the variance at the bottom, it would have been for Westchester and Upstate New York-Albany area.

O I show you RAPX 64, for identification, and ask you if you can identify that area for us?

A That would have been for delivery to Boston.

O Would these have been ~~deliveries~~ proposals that were made to Hershel Smith?

A Yes, they were.

O I notice Respondent's A&P Exhibit 62, is dated May 1964. Would that proposal have been submitted to him at or about that time?

A Yes, it would.

O Respondent A&P Exhibit 63 is dated May 1964. Would that proposal have been submitted to Hershel Smith at or about that time?

A Yes, it would.

O Finally, Respondent A&P Exhibit 64, entitled Milk Formula 1965 (April), would it have been submitted to Hershel Smith at or about April of 1965?

A Yes, it would.

Q Did you discuss each of these proposals with Hershel Smith at or about the time they were given to him?

A Yes, I did.

Q And did these proposals provide for delivery to the A&P stores in the area that you have mentioned?

MR. MATHIAS: Your Honor, before we question the witness about documents that have not been offered in evidence, are these documents to be offered in evidence?

MR. CURNIN: To simplify it, we offer them, now.

MR. MATHIAS: Before they are received in evidence, Complaint Counsel would like some voir dire.

JUDGE HINKES: Very well.

VOIR DIRE EXAMINATION

By Mr. Mathias:

Q Mr. Abrahms, referring particularly to RAPX Exhibit 63, I note that there is some writing at the bottom of that page. The last printed matter ends with a line "Total Platform price". There is some handwriting that appears there. Is that your handwriting, Mr. Abrahms?

A No.

Q Do you know whose it is?

A It would be my fathers.

Q You mentioned this writing, at the bottom, the delivery -- the price proposal variances at the bottom, I believe you stated, were for Westchester and Albany, New in this point in any way in bringing the milk into New York City.

JUDGE HINKES: Whose bringing it in?

THE WITNESS: A&P, using us as a supplier in New York City. He said he might consider Westchester.

By Mr. Mathias:

O Were you able to deliver in New York City?

A Under Glen & Mohawk's name, no.

Q RAPX 63, for identification, up to the line marked, Total Platform price, would have been applicable f.o.b. Glen & Mohawk's dock if A&P wanted to ship it from there to their New York City stores. Would that be correct?

A That is correct.

Q Returning to RAPX Exhibit 64, I note, or rather, 62, I note that there is a line below Total Platform Price marked "Delivery to store (Est.) AP cost". What is meant by that item, in parens, Mr. Abrahms?

A We, as a company, we were permitted only to sell on the platform at Fultonville, and we used public truckers to deliver the milk from our platform to the stores. What we meant by estimated, was that was the price that Bohack or some other chain we were currently selling, was paying to the truckers, and we had assumed, and in presenting this proposal, we had assumed A&P could make a similar arrangement with the trucker. We were not making the arrangement --

there -- when it gets to the store what kind of delivery is included? Are you talking about drop delivery at the store or some other type of delivery?

MR. MATHIAS: I am still going to have to object in view of the witness's answer this was based upon a type of delivery being contemplated at that time.

MR. CURNIN: I think I am entitled to find out what was the type of service being received by the other customers as this obviously -- well --

JUDGE HINKES: I think we can let the witness answer. What was the type of service contemplated?

THE WITNESS: Well, up to this time, the normal service to a store would include the driver bringing the milk into the store, the actual servicing of the dairy case, the price stamping of the milk, the pulling out all of the unsold milk or milk for credit, and the driver working out the order for the next delivery and such. What we switched to at this time was a very limited service basis where the store had to leave in the window his order for the next delivery, where the driver just dropped the milk on the sidewalk and left. In some cases he got his ticket signed and in other cases he did not get it signed, because of the speed of the delivery.

MR. CURNIN: That is the only type of service that is envisioned, that was included within the proposals that you have in front of you?

THE WITNESS: That is correct.

By Mr. Curnin:

Q Now, did you discuss with Mr. Smith the price advantage, the price benefit that he would receive with that type of delivery service?

A Yes, we did.

Q Would you tell us what that conversation was?

A We had a missionary sales job to do here because this was just at the changeover from full service, which was the accepted rule, to a limited service, which is today the accepted rule, and A&P had full service in all of the areas in which we were contemplating delivery and the store personnel and the supervisory personnel felt they needed the full service and we had to try to convince Mr. Smith that it was not necessary and the savings that he would accrue by having limited service would more than offset the new problems at store level by not having it, and it was to A&P's benefit to save the money and to go into this sort of an arrangement.

Q During your discussions with Mr. Smith in connection with the proposals that have been marked Respondent A&P Exhibits 62, 63 and 64, did you discuss with him any particular pricing formula that you used in establishing your price to A&P?

A We had always bought milk before on just so much a quart -- you know, 20 cents, 22 cents, whatever the price was. Our proposal to him had to move based on the Government announced price for milk, and as a result we set up a formula we would charge him so much a quart over the Government announced price for milk, because we could not, on the pricing we were quoting, we could not afford to absorb any future increases.

Q What was that amount above the raw milk costs that you discussed with Mr. Smith?

A Approximately 6 cents a quart above the raw milk cost is what we had suggested the milk should cost delivered to the store.

Q Did you break down for him your costs within thet 6 cents a quart?

A Yes. I think the price sheets are fairly well detailed as to a real breakdown as to those costs.

Q Would you tell us the pricing formula that you did discuss with Mr. Smith and how much you would add for your costs?

A Well, we had discussions with Mr. Smith, even subsequent to this period, verbal discussions, but basically, what I believe we had proposed originally, which has now since been slightly modified, is what, at that time, my father called the 2-2-2 formula.

Q Would you tell us your conversation with Mr. Smith about the 2-2-2 formula?

A Again, that 2-2-2 formula is basically just a reference area from which to work. It was not a refined breakdown. These formulas are more refined breakdown, but basically, what it was, was that the carton, at that time, in New York City, was, basically, a Canco Cargon, which cost 2 cents, and that the delivery was usually estimated -- we also estimated it at approximately 2 cents, and we figured the plant costs and plant profit at approximately 2 cents, and that is how we arrived at the 6 cent figure.

Q That was part of your discussion with Hershel Smith?

A Yes, it was.

JUDGE HINKES: When you speak of delivery, what delivery are you referring to?

THE WITNESS: The delivery from the plant into the store. In some cases it had to go through a depot and in some cases it could go directly, depending on the distance from the store to the plant.

JUDGE HINKES: Was this the formula for the private label?

THE WITNESS: It was basically our formula for the private label.

JUDGE HINKES: I thought you said you couldn't make delivery -- someone else had to do that?

THE WITNESS: That is correct. We made arrangements with truckers charging approximately a penny and a half to 2 cents, depending on the volume.

JUDGE HINKES: Charging whom?

THE WITNESS: The store.

JUDGE HINKES: Why do you add 2 cents on for delivery if the store is going to be paying that?

THE WITNESS: The store was always interested in knowing what his total price would be and we had to provide him with the name of a trucker who would be willing to deliver at approximately that price.

JUDGE HINKES: Actually, your price would be 2 cents less than the price quoted, and he would have to pay delivery. Isn't that right?

THE WITNESS: He would pay the trucker 2 cents.

JUDGE HINKES: It may be 2 cents. It would be maybe less or more?

THE WITNESS: We based it on what the truckers were currently charging our other customers.

JUDGE HINKES: But that was no assurance. Is that correct?

THE WITNESS: It was no assurance other than basic business practice, what we knew the current business practice was.

JUDGE HINKES: I don't quite understand -- if you are going to charge 6 cents over the raw milk cost, and that includes 2 cents that you were not paying, but you expected the customer to pay, then your price is really not 6 cents over the milk cost, only 4 cents over the raw milk cost, and the customer will assume whatever risk he has to assume to get delivery?

THE WITNESS: That is correct except, can I add one thing?

JUDGE HINKES: Yes.

THE WITNESS: Before we made any proposal to any additional chain or any additional store, we had always checked with the existing trucking companies in the area to see if any were interested in delivering to that store at approximately that price, or we would have been foolish approaching a store if we were not in a position to have the milk delivered.

JUDGE HINKES: I don't question your good faith in giving him an idea what they were going to have to pay -- all I am saying is you weren't really charging 6 cents over your raw milk price?

THE WITNESS: That is correct.

By Mr. Curnin:

Q As I understand it here, Mr. Abrahms, and I think it has been clear all along -- what you were doing, in your discussions, you were quoting a total price, because that is what the store wanted to know, what it would cost them to get the milk into their stores?

A That is correct.

Q And included within that cost was so much for processing and profit and containers, which would be your cost, and so much for delivery, which was based upon existing practice, and your own inquiry of truckers as to their availability to deliver the product?

A That is correct.

Q Did you have any discussions with Mr. Smith concerning the question of whether or not this pricing formula, which you have described for us, could be used in markets outside of New York?

MR. MATHIAS: Your Honor, I am going to object to the expertise of this witness as to where this formula could be applied.

MR. CURNIN: That is an improper objection, Your Honor, as to this question.

JUDGE HINKES: I think I must allow it -- simply -- whether or not he has any expertise -- he is being asked whether he had any discussions, and I am not necessarily being asked to accept his expert opinion on the subject. I think the question may be answered.

MR. CURNIN: Repeat the question for the witness please.

(The pending question was read by the reporter).

THE WITNESS: We did have lengthy discussions as to the application of this basic formula to other areas, and we told him that he had to be very careful in arriving at the Government raw milk price because, in some cases there were not Federal Orders with which to work off, where the price was very clearly posted, and in some order the price was quoted f.o.b. the city, and some orders it was quoted f.o.b. 200, like in New York, it is quoted f.o.b. 200 miles from the city, so he had to first establish very clearly what the raw milk cost was, because in all cases it was not as easy to determine as it was in New York.

Secondly, we told him as far as we knew, the Canco prices were similar all over, because we had some dealings with Canco in some other areas and we were aware their pricing was basically the same all over because their price sheets said it was applicable in all of the states east of the Continental Divide, and as far as the processing and delivery, we told him naturally it would have to be adjusted for the difference between our labor rates and the labor rates in the area in which he was quoting and we gave him, I believe, at that time, even detailed figures as to what we figured the labor portion of each of these segments was and we said, with an Accountant looking at the figures, he could then adjust them for whatever area of the country he then wanted to apply them to.

MR. CURNIN: When you say he could adjust it, you mean with the adjustments you pointed out he could apply his pricing formula in other areas?

We thought so, yes.

JUDGE HINKES: What about delivery?

THE WITNESS: We told him what portion of the delivery was the labor part of it and what was the truck part of it and he would have to adjust, based on what we told him, at that time was our labor cost in the delivery, and he would have to adjust it based on the labor rate, whatever other area he went into.

JUDGE HINKES: Is this any kind of formula, really. All you are saying is the seller is going to have to calculate his costs and arrive at a price. What formula is involved here?

THE WITNESS: The formula that was involved was, prior to this time milk was never quoted so much over the Government price. Today, it is the established method of buying milk.

JUDGE HINKES: That, I can understand. What you are saying is a seller will have to make a bid on costs over raw milk?

THE WITNESS: At that time, whenever you went into a chain, they asked you what your price was. Many times it didn't change with the Government price because a lot of the dairies estimated what the price was going to be for the year and gave them that price.

JUDGE HINKES: I understand your testimony. Apparently, what you are saying is that 6 cents is not necessarily the formula that everyone can use?

THE WITNESS: It is a basis for starting to figure out plus and minus.

JUDGE HINKES: Very well.

THE WITNESS: That is correct. It was a basis. At that time, the chains had no idea whether it was 6 cents, 12 cents, 14 cents. It was never even discussed. Most of them didn't even know what the raw milk was costing.

JUDGE HINKES: Aside from raw milk, I am speaking now of the override of 6 cents that you used?

THE WITNESS: That is correct.

JUDGE HINKES: That 6 cents is not necessarily applicable to any other dairy -- necessarily, I say?

THE WITNESS: Most of it -- a lot of it is, yes.

JUDGE HINKES: When you say a lot of it is, what do you mean?

THE WITNESS: The carton cost certainly is.

JUDGE HINKES: 2 cents is?

THE WITNESS: Yes.

JUDGE HINKES: What about the rest?

THE WITNESS: Most of the large companies, the cost of processing, the delivery, within reason, has to be similar for competitive reasons. There is no secret today what everyone's costs are, basically.

JUDGE HINKES: All I am saying is your 2 cents, for example, for delivery, is not necessarily applicable to Chicago where the distances may be entirely different, where the terrain may be entirely different, where labor rates may be entirely different?

THE WITNESS: We suggested to Mr. Smith he had to take into consideration the labor rate, the difference in the labor rate.

JUDGE HINKES: Okay. All I am saying is the 2 cents used is not necessarily applicable to any other dairy, except you, where you have experienced it. Is that correct?

MR. CURNIN: I would object to the question.

JUDGE HINKES: For what reason?

MR. CURNIN: I think the witness's testimony here, Your Honor, which has been gone into at some length by Complaint Counsel, myself, and Your Honor, is quite clear.

JUDGE HINKES: Unfortunately it isn't clear to me and that is very important.

MR. CURNIN: I certainly want the record to be crystal clear, Your Honor, but as I listen to the questioning, we seem to be getting away from what was the substantive discussion between the witness and Hershel Smith, what this witness's views were on the subject, and what those views were as communicated to Hershel Smith.

JUDGE HINKES: Let me make myself clear. The witness has testified that he discussed with Mr. Smith the use of a formula and the formula that was advanced was a certain cents per quart over raw milk costs. The cents used by this particular dairy, in talking to Mr. Smith, was 6. Divided up 2 cents for cartons, 2 cents for delivery, and 2 cents for plant costs and profit, and now, as I understand the testimony of the witness, he also told Mr. Smith that that formula was also useable elsewhere, and that is where we get down to the nitty-gritty. I want to know if that formula was really contemplated for Chicago, and that is what we are interested in, not really New York.

Now, apparently, it was contemplated, and I want to know exactly what was contemplated. Was the figure 6 cents contemplated or was merely a cost or a price overriding the raw milk contemplated, and that price or cost to be calculated by the dairy involved recognizing differences in costs from one dairy to the next.

MR. CURNIN: Isn't the question here, Your Honor, what discussions and what information was exchanged between this witness and Hershel Smith?

JUDGE HINKES: Exactly, and I say when he said to Mr. Smith -- this formula can be used -- what exactly was meant? Was it a formula of 6 cents per quart over raw milk costs or was it simply costs over raw milk to be determined by the dairy which may or may not be 6 cents?

MR. CURNIN: I think I heard the witness's testimony Your Honor, and I thought he went into some detail as to just what it was he told Hershel Smith was the way to use this formula, as a reasonable basis or bench mark for determining costs in other jurisdictions, but the record will certainly tell us as to the substance of that conversation.

JUDGE HINKES: I am not satisfied the record is that complete, and that is the reason for my questioning this witness, and it is important to understand what the record is showing. You may have a very good impression of what the record shows, better than I do. I don't question that, but unless I am so satisfied, it is incumbent upon me to be sure the record does make that clear.

MR. CURNIN: I don't disagree with that but I am suggesting, and that is all it is is just a suggestion, that the clarification, if it need be, should be in terms of what the conversation was between this witness and Mr. Smith.

JUDGE HINKES: I agree with you. I want to be sure I know exactly what was said. That is what I am asking him -- were you talking about any dairy can use 6 cents over raw milk when you spoke to Mr. Smith, or were you talking about any dairy could use its costs over raw milk which may or may not be 6 cents? That is my question and I think the witness ought to be able to answer that.

THE WITNESS: What we told Mr. Smith is that any well run dairy should be able to work off the 6 cent formula adjusted to the local labor rates.

JUDGE HINKES: Only labor?

THE WITNESS: We thought, at that time, that labor was the only factor of any significance which really varied. Naturally, a tremendous variance, also covered with Mr. Smith, would have been the size of the drop at the A&P stores. We had told them how many units a store had to use, and so long as it was similar between areas, there was no problem.

JUDGE HINKES: How about plant costs?

THE WITNESS: The plant costs, basically, should be the same except for labor, depending on area of the country there is no great difference.

JUDGE HINKES: You think their efficiency is the same?

THE WITNESS: Of every particular plant?

JUDGE HINKES: Yes.

THE WITNESS: Absolutely not.

JUDGE HINKES: Then, how can their plant costs be the same?

THE WITNESS: I said in any area, the efficient plants all have similar costs.

JUDGE HINKES: Regardless of the age of the equipment?

THE WITNESS: No, I said the efficient plants.

MR. CURNIN: May I interrupt here, so the record will be clear. Is this an inquiry as to -- that Your Honor is seeking to determine as to the reasonableness of the formula as this witness views it, as separate and distinct from conversations he had with Hershel Smith?

JUDGE HINKES: Oh, no. I am still trying to get exactly what he told Mr. Smith, and to the extent that his answer appears to be -- what shall I say -- open to different constructions, I am exploring that to be sure I understand which one of these constructions was conveyed to Mr. Smith.

MR. CURNIN: That is where I have my problem. I don't think the record here is clear on that subject at all. The record seems to me to be very clear as to the discussion he had with Hershel Smith, and I believe Your

Honor is asking questions as to what Your Honor feels may be concerning the reasonableness or soundness of the formula as applied or used or enunciated, but that is something, or may be something separate and distinct from conversations with Hershel Smith. That is the only point I make, Your Honor.

JUDGE HINKES: Perhaps, I have covered this sufficiently. I don't want to belabor it any further. Perhaps we can go on then. You may continue.

MR. CURNIN: I am thinking, now, in terms of the questions that you asked, Your Honor, about this witness, and this particular pricing formula.

In regard to this pricing formula, Mr. Abrahms, 2-2-2 pricing formula, call it what you will -- did you or your father originate this pricing formula?

THE WITNESS: I don't believe so.

MR. CURNIN: Well, was it something that was known --

MR. MATHIAS: Your Honor, I believe now we are going beyond the discussion between Mr. Smith and Mr. Abrahms.

MR. CURNIN: I believe we have been beyond that for some time.

MR. MATHIAS: And the proposed testimony here and I believe it is irrelevant.

JUDGE HINKES: Mr. Curnin, you objected continuously to what you believed was my going beyond. I don't believe, now, it is quite proper for you to engage in that particular inquiry, having insisted I should not.

MR. CURNIN: I don't think any statement of mine, Your Honor, could be one that would be characterized as insistance that Your Honor not proceed. Obviously, Your Honor would not permit me to direct Your Honor's questioning.

JUDGE HINKES: I think the language used was actually, you object, which is even worse. The point of the matter is, do we want to go into this beyond the discussions? I ask you that question, Mr. Curnin, having asked me that.

MR. CURNIN: The only point is, assuming Your Honor has had direct, I suppose I am entitled to a limited cross on the subject. It seems to me there is some question in Your Honor's mind about the formula and its application or possibly its creation, and as I was trying to simulate Your Honor's questions, and it is to this limited area I wish to address a few questions to the witness. I think it might be helpful to Your Honor.

MR. MATHIAS: Your Honor, I am going to have to object as being beyond the relevancy of the issues in this case, beyond the scope of the examination proposed for this witness. If we are going to get into philosophical discussions about the dairy industry with this witness, in

Albany, New York,or other parts of the country, this examination can be practically endless. I don't see why it can be fruitful. A&P has prescribed itself in the examination of this witness by its stated purpose for calling the witness as:

"To testify to his discussions with A&P on private lable milk and dairy products and the duration of arrangements for the supply of milk and dairy products", and I object to this line of questioning.

JUDGE HINKES: I must sustain the objection. Did you discuss with Mr. Smith the origin of the 2-2-2 formula?

THE WITNESS: Between my father and myself, we probably had 200 hours of discussions with Mr. Smith. They were very long, very laborious, and we were very interested at this time in selling A&P because it represented 200 times what our current volume was. There was a tremendous amount of time spent trying to educate Mr. Smith, in connecting into this sort of arrangement, and we did discuss with Mr. Smith, in detail, the different type of arrangements that some of the other national chains had at the time and the reason this 2-2-2, the reason that the split came about, is because another large competitor in the New York market was Safeway stores out of California, and Safeway at that time was about the only chain store in the country, I knew

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of, that had their own milk plant. In the New York area, they had come to us, that they wanted to use our plant, but they wanted to supply their own raw milk, wanted to supply their own cartons --

JUDGE HINKES: This, all, you talked to Mr. Smith about?

THE WITNESS: That is right. We were trying to show him the type of other arrangements the chains were making.

JUDGE HINKES: Remember, all I want to know now is what you talked to Mr. Smith about?

THE WITNESS: Yes. This was discussed with Mr. Smith. We also discussed with him the Bohack arrangement in New York; the Bohack Safeway arrangement in New York was where they wanted to supply the milk, they wanted to supply the cartons, and they wanted to do their own delivery, and they only wanted us to do the pasteurizing and the processing. So we had to establish with Safeway a price for that function. The wind up of the Safeway situation was we did not get the business, that the business went to another New York dealer, and Safeway supplied the cartons and did their own delivery under their own name, and the dealer in New York supplied the milk and processed the milk.

JUDGE HINKES: This, too, you told Mr. Smith?

THE WITNESS: Yes. He was aware.

JUDGE HINKES: No. Did you tell this to Mr. Smith?

THE WITNESS: Yes. We had lengthy discussions with Mr. Smith about the Safeway situation.

JUDGE HINKES: About Safeway's business going to someone else?

THE WITNESS: That is right, and about Safeway's general conduct of their business because we were trying to use them as an example of why A&P should go into private label because Safeway was in what we called a captive label. They had their own company -- they called it Lucerne Milk Company, and the milk was sold under Lucerne brand. We were trying to use Safeway as an example where they were building their own plants and going into their own delivery. We were trying to say he should use us to do his processing and providing the raw milk, and do what Safeway did -- furnish his own cartons and do his own delivery. That is why the split came about, Your Honor, because we were trying to break out, for him, what his costs would be if he did different segments of the operation.

JUDGE HINKES: But coming back to the original question, in your discussions with Mr. Smith, did you talk to him about the origin of the 2-2-2 split?

THE WITNESS: Yes.

JUDGE HINKES: What was the origin?

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THE WITNESS: As far as we were concerned, the basic origin was the type of arrangement that Safeway was making with the different areas. We frankly had never heard of it before that, until Safeway came along and approached us, and asked us if we would be willing to just do the processing -- they would give us 2 cents a quart to do the processing, and they would be willing to do their own delivery and furnish their own cartons.

JUDGE HINKES: That was 2 cents. Right.

THE WITNESS: That is right.

JUDGE HINKES: I am talking about the 6 cent formula?

THE WITNESS: Or they said they would also be willing to let us buy the carton and give us the 2 cents, but they preferred to buy it themselves because they felt they could buy it from the American Canco cheaper, because of their volume.

JUDGE HINKES: The other 2 cents was --

THE WITNESS: What they told us they had estimated their delivery would run, approximately, and what it was running, I believe, at that time, in the Washington -- I believe the fellow that came to see us was the fellow running the Washington area. I know he told us that is approximately what his Washington delivery was running. That is how this all evolved, was from Safeway.

2259.

JUDGE HINKES: I see. Very well.

By Mr. Curnin:

Q Mr. Abrahms, what was the duration of your milk supply arrangements with stores in the period 1965 to 1970?

A Our only arrangement is that on any of our large customers, we would appreciate it if they would give us ample notice because of the raw milk supply, but basically, they are under no legal obligation to do so and we have lost customers on as little as 14 days notice.

Q No further questions.

MR. MATHIAS: I don't believe we have extensive cross, but we do have a few questions, and I believe everybody is a little tired and hundry at this point.

MR. CURNIN: I believe this may be an imposition on the lawyers and what not, but Mr. Abrahms is on vacation and he has other plans and arrangements. I realize the importance of the proceeding and what not, but if, in fact, complaint counsel's cross would only be a few questions, and then I would ask the indulgence of the court and complaint counsel if we could take a 5 minute recess and come back -- it may well be we will be through at 1:30.

JUDGE HINKES: Only if I can be assured it wouldnt be longer than 1:30. I don't think I would be warranted in going beyond that point for everyone's sake here.

MR. MATHIAS: I can't be sure I will be finished by that time but I don't know that I won't be, either.

JUDGE HINKES: I do think, under the circumstances, we better take our lunch recess, at this time. I think that we can be back by 2:00, and Hopefully complete the witness's testimony before too long, but from previous experience, I have found very unlikely conclusion to assume that we can finish with any witness within 30 minutes or less. There is no assurance, and then to take a lunch recess, at say, 1:30, is a little too much. I think we better stop now. I am sorry if we inconvenience you.

THE WITNESS: The only problem is the last plane to where I am going to is 2:30.

JUDGE HINKES: Leaves at 2:30? That is rough.

THE WITNESS: Could we try and see if at 1:30, we are finished? If not, then we could break for lunch.

MR. MATHIAS: I would hate to inconvenience Mr. Abrahms. If we take a few minutes break, possibly we can finish by 1:30 or quarter of 2, and take a late lunch. I am willing to try it.

MR. CURNIN: We appreciate it, Your Honor.

JUDGE HINKES: All right. Lets take a short recess.

XXXXXX (Whereupon, at 1:00 p.m., a recess was taken until 1:05 p.m.).

JUDGE HINKES: On the record. You may cross examine.

XXXXXX

CROSS EXAMINATION

By Mr. Mathias:

Q Now, Mr. Abrahms, this 2-2-2 formula that you discussed was basically based upon your costs at that time period. Is that not correct, sir?

A Basically. Correct.

Q And for the area in which you were doing business. Is that correct, sir?

A Only that we had discussed, Mr. Mathias, with Safeway, and the fellow we had discussed it with in detail in Safeway, was running their Fort Worth plant, and one was running their Washington operation, and they came to Fultonville on a couple of occasions, because they were very serious about having us do their work or even contemplating buying our facility, at the time.

Q Were you familiar with the Safeway method of operation in either Washington or the other area you mentioned?

A Yes.

MR. CURNIN: I would object to this line of questioning as being irrelevant.

MR. MATHIAS: Now, in connection with your costs, at this time, you mentioned that there could be some variable in labor costs. How did your costs in the Fultonville-

MR. CURNIN: I object.

JUDGE HINKES: Overruled.

MR. MATHIAS: Could you find the question and read it to the witness?

(The pending question was read to the witness, by the reporter, as follows:

"Now, Mr. Abrahms, how did your labor costs compare in the Fultonville-Albany area with labor costs in the New York City area, in 1964 and 1965?")

THE WITNESS: Mr. Mathias, I have to answer that in 3 distinctment segments. The first segment would be the plant costs, and to the best of my knowledge, again, we would have to get out the details at the time, but to the best of my knowledge, at that time, our plant labor cost was running approximately 25 to 30 percent under the Metropolitan labor costs. Our over-the-road delivery costs and our store delivery costs were running similar, because of the Union problems in New York. We had to operate with the Union in the area into which we were delivering so the delivery to Bohack was being done by a Union delivery company with a contract under 584, which was similar to all of the other dairies in the city and the over-the-road trucker belonged to Local 338, which was also similar to the other New York over-the-road costs, but where the difference would have been would have been in our production, in which we had our own

[redacted]

A Yes, there was.

Q And what was that particular volume figure, sir?

A We told Mr. Smith that all of our costs, and all of our estimated costs, were based on delivering approximately 450 to 500 cases a day, and that because of the time problem, we could not deliver more -- we could deliver between 8 to 12 stores per day, so it would have meant the stores would have had to take between 40 and 50 cases.average per delivery.

Q Each store would have had to take from 40 to 50 cases per delivery?

A As an average. They may have had some stores taking 150 cases a day. Then, we could afford 3 small ones on that particular route. We had to be able to deliver 450 to 500 cases to a maximum of 5 stops, and preferably to 10 stops.

Q These were not on your trucks, that this delivery to the stores was to be made. Is that correct?

A That is correct.

Q Were these minimums set by you or by the trucking companies with whom you were dealing?

MR. CURNIN: Objection, Your Honor.

JUDGE HINKES: Again, is this something that he spoke to Mr. Smith about?

MR. MATHIAS: Well, Your Honor, I believe it is quite clear here that Glen & Mohawk was not making the delivery themselves, so -- I will ask an intervening question. Was the subject of how the product would be delivered to the individual stores discussed with Mr. Smith?

THE WITNESS: Yes, it was.

By Mr. Mathias:

Q And when this minimum volume figure was mentioned was this mentioned as being a requirement of the trucking company who you had in mind to do the delivering?

A It was based on the experience the trucking company was having with other customers similar to A&P, correct.

Q This was a particular trucking company you had in mind, at that time?

A Correct.

Q Now, in this instance with the trucks that were making deliveries to the stores, I think you mentioned earlier there was over-the-road hauling as well. That would be a separate truck. Is that correct?

A That is correct.

Q And was there any discussion of volume necessary for the -- necessarily related to your cost of hauling from Fultonville to the local truckers?

MR. CURNIN: May I have the question read back?

By Mr. Mathias:

Q Let me rephrase the question. We have noted, now, there was some discussion with Mr. Smith of the volume requirements

A I was in the Central Western Division. I was the Assistant Regional Director of Purchasing.

Q During what time period would this have been?

A Approximately 2 years from prior to that.

Q Where were you located with the Central Western Division?

A In Detroit.

Q Mr. Bayma, as Purchasing Director for the Chicago Division, what were your duties?

A To procure all of the items that we sell and use in our stores.

JUDGE HINKES: Mr. Dembrow, you said -- what were your duties?

MR. DEMBROW: I meant to say, what are your duties.

JUDGE HINKES: Very well.

By Mr. Dembrow:

Q Mr. Bayma, after you became the Purchasing Director of the Chicago Division in 1970, did you solicit quotes for private label milk and dairy products?

A Yes.

MR. SCHAEFER: Your Honor --

MR. MATHIAS: Your Honor --

JUDGE HINKES: You may state your objection first, Mr. Schaefer.

MR. SCHAEFER: Insofar as his testimony is being offered in relation to Count 3, I object on the basis of the time period covered by the testimony.

MR. MATHIAS: My objection is insofar as the questioning may relate to any period subsequent to March of 1970, Complaint Counsel would have an objection as to relevance and materiality as to the issues in this case.

JUDGE HINKES: Mr. Dembrow?

MR. DEMBROW: Your Honor, we believe that this testimony is quite relevant as to what happened in 1971 and 1972. It is quite relevant to the good faith discontinuance of the milk supply arrangement that had been in existence between A&P and Borden and testimony in regard to the termination of this agreement is relevant and should be heard.

MR. MATHIAS: There is no question that this contract was terminated in February of 1972. Complaint counsel never contested that point and we have never contested A&P's contention that it was terminated at that time because they received a better offer in February of 1972, just previous to that, but we still fail to see the relevance of this information to the issues in this case.

MR. DEMBROW: If I may, Your Honor, the Commission has briefly discussed this subject amongst other subjects in its order dated January 18, 1973, when it noted that in regard to the issue of good faith discontinuance -- by stating that "good faith discontinuance can only be decided after all of the evidence is in, particularly in a situation of this sort where the contractual arrangement with which the complaint is concerned was discontinued by the Respondents subsequent to formal issuance of the complaint". It is A&P's position that this is inaccurate and that this is good reason why we believe the Commission noted they would have to wait until all of the evidence was in. We believe Mr. Bayma's testimony and the documents to be introduced through him will set the record straight, establish the facts, and in regard to this termination that did occur, so that this issue can be presented at the appropriate time.

JUDGE HINKES: Let me ask you, Mr. Dembrow. You have heard Mr. Mathias admitting, and I presume that he would so stipulate, that the contractual arrangement was abandoned around February of 1972, because of a better offer, and that it is no longer in effect. Is there anything more that you wish to prove under those circumstances?

MR. DEMBROW: Yes, Your Honor. We would agree that if you wish to say the actual formal precise date of termination when A&P ceased to be being supplied by Borden was in February 1972. However, the process that led up to that occurence in February 1972 began a long time earlier. The process of solicitation -- that was the question that I had posed to Mr. Bayma, began, as I believe Mr. Bayma will testify, at a much earlier point in time.

JUDGE HINKES: What relevance would that have? They may have made all of the solicitations in the world, but if they didn't discontinue their arrangement, you would have no argument at all.

MR. DEMBROW: We believe that the fact that solicitation began at a much earlier point in time --

JUDGE HINKES: I say, admitting that.

MR. DEMBROW: I say, at an earlier point in time, before issuance of the complaint, is a very critical point in evaluating the issuance of discontinuation. All we have so far with Complaint Counsel's statement is that in February of 1972, the milk supply arrangement between A&P and Borden ceased.

JUDGE HINKES: And that was prior to the issuance of the complaint?

MR. DEMBROW: That was subsequent to the issuance of the complaint, Your Honor, and we believe that is a very unfair and inaccurate picture of exactly what occurred.

MR. FALLS: May I inquire of Mr. Mathias if he is willing to stipulate that the arrangement was terminated in February of 1972, if that was the case, that the negotiations related to the termination antedated the filing of the complaint and that the termination was in good faith and without reference to the filing of the complaint?

MR. MATHIAS: I can't stipulate to all of that, obviously.

MR. FALLS: If he would so stipulate, obviously, there would be no problem.

JUDGE HINKES: I will allow the testimony, then.

MR. MATHIAS: I would like to note the fact solicitations were made proves very little in any event, and this would appear to be opening the possibility of the question of the legality of later negotiations and later --

JUDGE HINKES: Be that as it may, I think that the Respondent is entitled to make out a basis in the record for the argument that he will later make.

You may continue, Mr. Dembrow.

BY MR. DEMBROW:

Q I believe there was a pending question but I will just rephrase it.

Mr. Bayma, after you became Chicago Division Purchasing Director in April of 1970, did you solicit quotes for private label milk and dairy products?

A Yes.

Q When did you first begin soliciting private label quotes?

A They were prior to April of 1971, and I can remember that because that is the date we got the first -- the Borden bid.

Q I would like to have marked as the next A&P exhibit, which I believe is RAPX-42 --

MR. MATHIAS: Your Honor, before this document is shown to the witness, Complaint Counsel would like to note we have made a request of A&P for all correspondence and internal memoranda and communications dealing with these various offers, and have been refused such background information, and I would ask that such documentation be obtained and turned over to Complaint Counsel prior to an examination as to these documents.

JUDGE HINKES: I am not sure I understand what you are requesting now.

MR. MATHIAS: Your Honor, these documents are incomplete in that they consist of various letters received by A&P in response to what Mr. Bayma states has been his solicitation. Yet, there is no evidence of the solicitation, the nature of the solicitation, any evaluation of the various offers back at A&P. We have been denied access to all of this documentation which would allow a proper examination as to these documents and which would allow a complete record as to these documents. These documents in and of themselves are incomplete. They are only a portion of the transaction.

MR. DEMEROW: Your Honor, first of all, I don't believe that the amount of material Mr. Mathias would like to have is at all relevant to this issue. We have just discussed before exactly what we are trying to establish through the testimony of Mr. Bayma, and those documents are merely support of that testimony to establish certain facts. This is the bid that Mr. Bayma just referred to in his testimony as helping him to determine when he began soliciting private label quotes in 1971. We are not attempting to set forth in vast detail every single piece of paper, every single document that was received during those solicitations. We merely want to establish certain points on the record in regard to this good faith discontinuance.

MR. MATHIAS: That is exactly my point, Your Honor. These are not being offered for the sake of what was offered to A&P. These are being offered to show a good faith set of negotiations on the part of A&P to be used in connection with a proposed good faith argument in connection with their discontinuance of Borden as a supplier, the discontinuance of the contract in question. In view of the good faith element of this, there is no way that this document can be considered relevant in and of itself. It is only a partial document insofar as this particular issue is concerned.

JUDGE HINKES: First of all, let me ask you -- we what makes you think this is a partial document? I am referring, now, to the specific RAPX 42.

MR. MATHIAS: I have no knowledge as to whether or not this particular document is complete and that would have to be resolved through the questioning of Mr. Bayma. My point is, if it is to be used in connection with a good faith defense on the part of A&P, that it is a partial document insofar as that defense is concerned, because it shows nothing about the other side of this solicitation. It is no evidence as to the communications from A&P to Borden and the internal documentation of A&P surrounding these offers.

JUDGE HINKES: Have you attempted to get that information?

MR. MATHIAS: Yes, Your Honor. As I stated, in the beginning, we had requested this of A&P and been denied it.

JUDGE HINKES: Have you made a formal request by subpoena?

MR. MATHIAS: No, Your Honor, we have not.

JUDGE HINKES: Then I have nothing on which to make any ruling. It seems to me that that may be something to consider for rebuttal purposes, if you care to, but as of this moment, all I have is an offer in evidence of certain documents. You say that is not complete. As far as I can tell, I have no such admission from Mr. Dambrow, and I see no reason, therefore, why I should foreclose his offer in evidence of such documents as helps his case. If there are other documents which hurt him, and you think that you can get them, I think it is incumbent upon you, Mr. Mathias, to attempt to get them, and then if there is a refusal to supply such documents, we can consider what remedies to impose for that refusal, but at this juncture, I think that this document is not irrelevant to the proceedings, at least for the purposes demonstrated by Mr. Dembrow. I shall overrule the objection.

XXXXXX (The document referred to was marked RAPX 42 for identification).

BY MR. DEMBROW:

Q I think we were at the position where the document had just been marked, Mr. Bayma. I show you what has been marked as RAPX 42, and ask you to look it over and ask you if you can identify it?

A Yes. This was the quote received from Bordan.

Q About when would you say you received that quote from Bordan?

A Approximately April 20 or 21.

Q I offer RAPX 42 in evidence, Your Honor.

MR. SCHAEFER: Just note our continuing objection with respect to the time period, Your Honor.

MR. MATHIAS: Your Honor, Complaint Counsel would like to note their objection as to the time period and also as to the relevance even for the purposes in which it is offered.

JUDGE HINKES: I shall overrule the objections and allow the document to be received.

XXX (The document heretofore marked RAPX 42, for identification, was received in evidence).

By Mr. Dembrow:

Q Mr. Bayma, in regard to soliciting those milk quotes in 1971, did you receive any instructions or suggestions from A&P's Headquarters in New York?

A No.

Q Did you receive any other written quotes in response to your solicitations in 1971?

A Yes, we received quotes from Dean, Spinney Run, Hawthorne Melody, Medow-Gold and Wanzer.

Q I would like to have the reporter mark this next document RAPX 43, for identification.

XXXX (The document referred to was marked RAPX 43, for identification).

By Mr. Dembrow:

Q Mr. Bayma, I show you a document that has been marked as RAPX 43. Will you look it over and tell us, if you can identify it?

A This was the Dean Company bid.

Q Do you recall about when you received that bid?

A On or about October 19th. It might have been a day later.

Q October 19th of what year?

A 1971.

Q Your Honor, I offer RAPX 43 into evidence.

JUDGE HINKES: Is there objection?

MR. MATHIAS: Just the same objection, Your Honor, as to the previous exhibit.

MR. SCHAEFER: I have a continuing objection, Your Honor.

JUDGE HINKES: Very well. The objections are overruled. 43 is received.

XXXX (The document heretofore marked RAPX 43, for identification, was received in evidence).

MR. DEMBROW: Your Honor, I would like the reporter to mark as RAPX 44, a document.

XXXX (The document referred to was marked RAPX 44, for identification).

By Mr. Dembrow:

Q Mr. Bayma, I show you what has been marked as RAPX 44, and ask you to look it over and tell us, if you can identify it.

A Yes. This was the bid received from Spinney Run Farms on or about September 16, 1971.

Q Your Honor, we move RAPX 44 into evidence.

MR. MATHIAS: Continuing objection, Your Honor.

JUDGE HINKES: I am overruling the objections that are continuing. 44 is received.

XX (The document heretofore marked RAPX 44, for identification, was received in evidence).

By Mr. Dembrow:

Q I notice that the bid you received from Dean, RAPX 43, is dated October 19, 1971, and the bid you received from Spinney Run, RAPX 44, is dated September 16, 1971. Do you recall when you initially solicited those 2 dairies?

A It was sometime before that. I couldn't tell you exactly the date. We had verbal discussions with them far in advance, but it took this long to get the bids in, the quotes in.

Q Could you estimate what part of the year it might have been?

MR. MATHIAS: Your Honor, I do not believe that a guesstimate is warranted in the record at this point and the witness should be cautioned to answer only within his own recollection, to the best of his ability.

JUDGE HINKES: I think this is permissible for lack of any more definite statement that may be obtained from the witness. The objection is overruled.

Can you tell us?

THE WITNESS: I would say, just guessing, it would be back in April of 1971 we started talking to them.

By Mr. Dembrow:

Q I believe you stated that you solicited Borden and received their bid dated April 1971. Do you recall if you solicited any dairies before you solicited Borden?

A I believe we had some conversation with possibly Sealtest and maybe Wanzer.

Q I would like the reporter to mark 2 documents, RAPX 45 and RAPX 46, and ask you to read them over and tell us if you can identify them.

JUDGE HINKES: You better do that one at a time so the record won't be confused.

MR. DEMBROW: Fine. I will do that.

(The documents referred to were marked RAPX 45 and RAPX 46, for identification).

By Mr. Dembrow:

Q If you could just read RAPX 45, first, and tell us if you can identify it, Mr. Bayma.

A Yes.

Q You can identify it?

A Yes.

Q Would you identify it, please?

A We received this from Mr. Wagner on about June 23, 1971, as an amendment to the Borden bid.

Q Would you look at the document you have in front of you, Mr. Bayma, which has been marked RAPX 46, and tell us if you can identify that?

A This is a letter from Mr. Wagner of the Borden Company. We received it on or about November 11, 1971. This is also an amendment to the Borden quote.

Q I offer in evidence RAPX 45 and RAPX 46.

MR. SCHAEFER: The same continuing objection.

JUDGE HINKES: Your objection is continuing?

MR. MATHIAS: Yes, sir.

JUDGE HINKES: The objections are overruled. 45 and 46 are received.

XXXXX (The documents heretofore marked RAPX 45 and RAPX 46 for identification, were received in evidence.)

By Mr. Dambrow:

Q Mr. Bayma, what was the final result of the 1971 solicitations for private label milk products in Chicago?

A We selected Dean and Spinney Run Farms to service the stores in the Chicago Division.

Q Who would Dean and Spinney Run be replacing?

A Replaced the Borden Company.

Q Did you, as the Purchasing Director of the Chicago Division, recommend the switch to Dean and Spinney Run?

A Yes.

Q What were the reasons for your recommendation?

A Lower prices.

Q In other words, Dean and Spinney Run were offering you lower prices than Borden?

A Yes.

Q When did Dean and Spinney Run replace Borden?

A On February 28, 1971. No, February 28, 1972.

Q How much notice was Borden given as to their termination?

A 30 day notice.

Q Are Dean and Spinney Run, as of this date, still supplying A&P's Chicago Division with fluid milk products?

A Yes, they are.

Q Has Borden supplied A&P's Chicago Division with any fluid milk products since they were replaced in February of 1972 by Dean and Spinney Run?

A No.

Q No further questions, Your Honor.

MR. SCHAEFER: No questions, Your Honor.

JUDGE HINKES: Mr. Mathias?

MR. MATHIAS: Could we have just a few moments break, Your Honor, before cross examination?

JUDGE HINKES: Yes.

MR. MATHIAS: Could we have a 5 minute break?

JUDGE HINKES: Take 5 minutes, now.

(Whereupon, at 11:40 a.m., a recess was taken until 11:45 a.m.)

JUDGE HINKES: On the record.

You may cross examine, Mr. Mathias.

CROSS EXAMINATION

PROCEEDINGS

JUDGE HINKES: The hearing will come to order. You may call your next witness, Mr. McInerney.

MR. McINERNEY: Mr. Cannon, will you please step up?

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FRANK T. CANNON, SR. was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

JUDGE HINKES: Would you state your full name, please.

THE WITNESS: Frank T. Cannon, Sr.

JUDGE HINKES: Thank you.

DIRECT EXAMINATION

By Mr. McInerney:

Q Would you state your home and business address, please.

A I live at 2085 Apple Grove, North, North Canton, Ohio. I am presently employed by the Superior Dairy Company, Incorporated, with headquarters in Navarre, Ohio.

Q What is your position with Superior Dairy Company?

A I am the vice president and general manager.

Q And for how long have you been employed by that dairy?

A About seven years and four or five months.

Q Previous to that by whom were you employed?

A I was employed by the Bowman Dairy Company with headquarters in the city of Chicago.

Q And what was your position with the Bowman Dairy Company and what were your duties just prior to your leaving?

A Prior to our sale to the Dean Foods Company, I was the general manager of all Chicago operations.

Q When did you start in the Dairy business?

A On May 16, 1934. Very close to 40 years ago.

Q Would you give us a brief description of your career in the dairy business, please.

A I started as a route salesman, a home delivery service man; that is what a retail route salesman is. I spent approximately a little over a year on that job and was moved into a position of solicitor. A solicitor is one that can secure accounts whether they are home delivery or wholesale accounts by going out and knocking on doors.

You do not have products with you nor do you have a vehicle; you just walk around looking for business. I spent a number of years just as a solicitor. I will guess at the time, maybe four or five years.

But in being advanced to my next position as what we call assistant managers, I continued to have the same responsibility of soliciting the wholesale end of the business.

Q What was your next position at the Bowman Dairy?

A I was transferred to another branch of the company and was what was called the first assistant branch manager in a branch that had over 500 delivery routes and approximately 700 employees.

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Q After that?

A A year and a half or so later, I was made the branch manager or the head man in that branch.

Q What was that branch again?

A That branch was called the North Division Branch of the Bowman Dairy Company and it served the industrial area of Chicago, meaning Chicago's Loop, primarily.

Q Subsequent to that, what was your next position?

A I was then moved to the main office about two or three years later.

Q The main office being where?

A 140 West Ontario Street in Chicago.

Q What was your position at the home office?

A My first position there was assistant to the vice president in charge of sales.

Q And subsequently to that, what was your position?

A I was moved into the Executive Sales Committee. That was responsible for all of the sales, marketing, advertising and merchandising functions in the Bowman Dairy Company.

Q Approximately what year would that have been--if you can recall?

A Somewhere around 1953.

Q Would you please continue to tell us what various positions you occupied after that at Bowman Dairy?

A In my position at that point I was being trained by the vice president in charge of sales to take over and supervise and call on major trade accounts that we had, such as the A & P Tea Company, the ~~Hi-Lo~~ High-LOW Food Stores, the Kroger Company. These were all large, multiple-store accounts.

Q Were all of those customers of Bowman Dairy at that time?

A Yes, sir, in part, not in total.

Q Would you please explain what you mean by "in part"?

A We only served approximately 70 to 80 of the A & P stores out of something around 250 stores that they had out of their Chicago Division.

The Kroger Company, to the best of my knowledge, we served them a hundred percent and that would be something around a hundred stores in that group.

The ~~Hi-Lo~~ High-LOW Food Stores had approximately 45 stores and we served all of their business. When I say "all of their business," I am referring to fluid milk business.

Q Do you know who served A & P in addition to Bowman Dairy at that time?

A The other prime company was the Borden Company. But there were many other companies that split some of the business all throughout the marketing area out of the Chicago Division.

Q How long did you continue in that position?

Incidentally, did that position have a title? I missed it if it did.

A Yes, I was called assistant to the vice president at that time.

Q For how long did you remain in that position?

A About three to four years.

Q Subsequent to that, what happened?

A That is when I was moved into the Executive Sales Committee and I was made an associate director of the company at the same time.

Q And what were your functions and duties in that position?

A Well, I was in charge of all of the wholesale sales in the Chicago Metropolitan Area. The only sales I did not have charge of was those that were served to the homes, directly to Mrs. Consumer out of route trucks.

Everything else, it went through hotels, hospitals, nursing homes, or stores, that all came under my direct supervision.

Q Did you thereafter occupy another position with Bowman Dairy?

A Yes, sir, finally, as we drew down into later years, I became the assistant general sales manager of the company and I worked for -- my general sales manager at that time was a man by the name of ~~Boyd~~ Roy Buthman.

Then in two or three or four years, I don't know exactly the time period here, I was made marketing director under a new general sales manager, which was another job classification. From marketing director, and near the end of the company, I was made the general manager.

Q And what were your duties as general manager?

A I had total responsibility of all sales and distribution, merchandising, marketing and advertising in the company.

Q And approximately when did you become a general manager of Bowman Dairy Company?

A Sometime early in 1965. It could be late '64. I am not sure of that date.

Q You mentioned that in the 1950's A & P was a customer of Bowman Dairy and that you had something to do with that account. What exactly did you have to do with the A & P account?

A After about a year's training by Mr. Larson, the vice president in charge of sales, he ultimately turned over the account to me to handle personally. I was the one responsible at the top level to call on the dairy merchandiser and the director of purchasing in all of the major accounts we had, and especially the A & P, which we used to call "his baby," it was turned over to me.

He was planning retirement and I had the A & P account on my own from about 1955 or early 1956 until they quit us in 1958, October 1st.

Q Why did they quit you?

A They called us in, called me in and told me we were not competitive in our pricing.

Q Do you know who the competitor was that was below you?

A Yes, sir, I was told it was the Borden Company that offered them a better price, although there had been no request for bids at that time.

Q And did you attempt to meet the Borden price at that time?

A Yes, sir, we did. We did locally by calling on -- I personally called on a gentleman by the name of Thad Harshbarger.

Q Who was Mr. Harshbarger?

A He was the head of purchasing for the Chicago Division of the Atlantic and Pacific Tea Company.

JUDGE HINKES: When was this?

THE WITNESS: This was in 1958, about the month of -- it could be late August, maybe a little earlier in August. They normally give us about 60 days' notice and they left us on October 1st, so it would be somewhere in August that we got the notice.

By Mr. McInerney:

Q What was the result of your effort to meet that price?

A It was futile. We got no place. Our president, Francis H. Kullman, called on Mr. Carl Anderson, who was the vice president of the Division and carried the title of director of purchases also. His efforts there were also futile.

Q From that time in 1958 and in subsequent years, what, if any, contacts did you have with A & P?

A Well, I personally called on Mr. Elmer Schmidt, who was promoted into the buying job, probably averaged maybe two to three times a year from the period 1958 until the time I was called in later to see him. I also had made one or two visits to the director of purchases, which was Mr. Ira Bartels.

Q What was the purpose of those visits?

A It was mostly to keep the door open and try to keep them friendly, hopefully that they would give us another opportunity some day to bid on the business.

Q You mentioned that these visits were more or less routine until the time when you were called in. Can you place the date or year of that?

MR. MATHIAS: Your Honor, it is rather meaningless in this instance. I won't file an objection but I will note this is a leading question in that Mr. Cannon has not spoken yet of having been called in.

MR. McINERNEY: Maybe I misheard him.

JUDGE HINKES: I thought he said something to that effect, Mr. Matthias.

But, in any event, we will go on. The record will show what he did say.

By Mr. McInerney:

Q Did you understand my question?

A Yes.

Shall I answer it?

JUDGE HINKES: Yes.

THE WITNESS: I was called on the telephone by Elmer Schmidt, who was then the head buyer at A & P.

By Mr. McInerney:

Q Approximately when was that?

A I am guessing, the month of July sometime in the year 1965.

JUDGE HINKES: Now is that Elmer Smith or Schmidt?

THE WITNESS: Elmer Schmidt.

By Mr. McInerney:

Q Would you give us the substance of that conversation, please?

A As best I recall, there was very little conversation on the telephone other than he wanted me to come over and discuss with him the possibility of our making a bid for all of their fluid milk business.

Knowing Elmer as well as I did, I am sure there was some small talk, but I did visit him in the next day or two, maybe that very day, I don't recall exactly.

Q Tell us, please, what he said to you and what you said to him on the occasion of that visit.

A Well, on that first visit -- I might add I discussed it with my superiors first, who I reported to was the president of the company, and we were trying to protect ourselves from the fact it might be a fishing expedition, as we called it, just to find out what the pricing level was in the market. I ~~will end~~ went in with that not maybe as objective a look as I should have.

I went in and discussed it with him and went over the long time it took to make a quotation. He said he wanted it in detail. I told him it would take some time to do this and I was hopeful he was serious about it, and he assured me he was, that this was open for bid and others would be asked to bid also, meaning others than the Borden Company. They were going to be asked also, as I understood it. What is the best recollection I have of that first visit.

I beg your pardon, there was one thing he was very emphatic about because it happened on occasion where people made bids and couldn't live with it; he wanted to make sure we had some profit in the bid for ourselves.

Q Did he tell you why he wanted to be sure?

A This was the Tea Company policy as far as I knew.

Q Where was this conversation?

A This was in the Tea Company offices on Pulaski Road in Chicago.

Q Did Mr. Schmidt have an office there?

A No, sir, he did not have an office. He sat out at a desk very similar to one of these desks you see down in front of us here, and right next to him on the other side was his secretary and on down the line from him were rows of buyers sitting at desks the same way.

Q Now in the course of that conversation did Mr. Schmidt tell you how many stores were to be served?

A He gave me a list of the stores. I just don't recall the number but they are in the exhibit here. He gave me the total list of stores that we were to bid on in Indiana, Iowa, and Illinois and Southern Wisconsin, too -- I think there are some in Southern Wisconsin in that quotation.

That is the only specifications or the only information he gave us to work on, that these are the stores, you bid on them.

Q You mentioned -- just to make sure, maybe I'd better ask the question a little differently.

How long did you anticipate it would take to work up this bid?

A Keeping hard at it, it would take two or three weeks' time.

Q Did you so indicate to Mr. Schmidt in the course of this conversation?

A I did, I was very emphatic about it.

Q Why would it take that long?

A The Tea Company was very precise in what they accepted from you in quotations. I think my exhibit that I brought to you will show that.

We had to show the marketing areas, the locations, every area in it, plus across the board how we broke down our cost to them, from the cost of product into the silos, processed, the mark-ups, everything had to be in detail for them when you made a quotation.

This was our practice over the years.

Q In your last answer you referred to something that you brought with you. I would like to show you something that has been marked R A&P Exhibit 50 and ask you if that is the document to which you referred.

A This is the carbon copy, as we called them in those days, of the bid I made to the A & P Tea Company. It is the full quotation.

Q Is that the document to which you referred in your previous answer?

A Yes, sir, that is correct, it is.

Q How did I come into possession of that document?

A I gave this to you.

Q When?

A Last evening.

Q Where had it been prior to that time?

A In my own personal files for the past eight or nine years, whatever the period of time is.

Q The document bears the date August 31, 1965.

First of all, is that how you fixed the time of the meeting with Elmer Schmidt that you just described as being approximately in July of 1965?

A That is correct, yes, sir.

Q Is it your testimony that this document has been in your possession from the time or approximately the date that it bears up until last evening?

A Yes, sir; no place else.

Q Why did you keep it?

A When our company sold out to the Dean Foods Company, January 19, 1966, all of these were my private files from my own offices. I took them with me to my offices in the Dean Company.

In a telephone conversation with our former attorney, Mr. L. Edward Hart, I discussed this and several other documents I had with me in my files as to what I should do to dispose of them. His advice and counsel to me was he felt I should keep them for a while. And I did just that.

Now in my transition from the Dean Foods to my present employer, I just took a whole file box, a cardboard file box, of stuff with me and this was one of just two or three things that I ultimately kept and still had when you first contacted me.

I had even forgotten about it, that I had it.

Q Would you just briefly tell us what RAPX-50 is?

A This is the carbon copy of what I presented to Elmer Schmidt at the A & P Tea Company on August 31, 1965. It is all the exhibits and everything they required along with their pricing.

Q Is that complete as far as you know; is that a complete copy of what you gave to Elmer Schmidt?

A Yes, it is; it is the only thing we gave Elmer Schmidt.

MR. [illegible]: For purposes of the record, I would like to note that RAPX-50 is virtually identical with Commission

Exhibit 50 except it is the copy Mr. Cannon saved.

I would like to offer it in evidence at this time.

MR. MATHIAS: Commission has no objection, except we would like to note there is one page which was not in Commission 50-A to -V, I think, and that appears in this particular exhibit as Respondent A & P Exhibit 50-S, which deals with cottage cheese and was not in the original Commission exhibit.

JUDGE HINKES: Let's first get some indication on the record of the sub-lettering that you have for that exhibit, Mr. McInerney. It is from 50-A through what?

MR. McINERNEY: "W."

JUDGE HINKES: Thank you.

And you say that one page is missing?

MR. MATHIAS: I am just noting for the record that there is one page missing, compared to Commission Exhibit 50-A through -V. Complaint Counsel are offering no objection to the document.

JUDGE HINKES: Very well, Respondent's Exhibit 50 is received.

(The document referred to was marked Respondent A & P Exhibit 50-A through -W for identification and received in evidence.)

By Mr. McInerney:

Q Let me ask you, Mr. Cannon, throughout your talks or negotiations with A & P with respect to this subject of Bowman supplying milk to A & P sometime in 1965, did you speak to anyone else at A & P with respect to that, other than Mr.Schmidt?

A No, sir, I did not.

Q Did you speak to other people in Bowman with respect to that subject?

A Yes, sir.

Q Did anyone else from Bowman, to your knowledge, discuss the subject with anyone from A & P; that is, other than yourself?

A Not to my knowledge, no, sir.

Q What was your next contact with Mr. Schmidt subsequent to this meeting that you have just described sometime in July of 1965?

A I don't quite follow you, Mr. McInerney. Would you say that again, please?

Q I think you told us about a meeting you had with Mr. Elmer Schmidt in July of 1965 and at this time he requested a bid or quotation from Bowman, and I was going to ask you what your next contact with Mr. Schmidt was on that subject.

A All right, sir.

Before I made my next contact, of course, we prepared this document, this series of exhibits here.

Q Let me interrupt a moment and ask you how that was prepared.

A That was prepared by our senior cost accountant, Dave Parmalee. He did a great deal of the cost work on it,with some help from myself. Most of our evenings were spent in preparing this. We tried to keep it as quiet as possible and not excite anybody in the Bowman Dairy as to the possibilities of our securing a large-size account such as this.

Things seem to travel very rapidly in the dairy industry, and we worked evenings, just he and I alone, and on occasion our attorney, L. Edward Hart, also sat in with us and discussed some of the cost factors with us.

Q Do you recall the name of Mr. Hart's firm?

A Yes, it is Montgomery, Hart, Pritchard & Harriet.

Q Where is that law firm or was that law firm?

A In Chicago.

Q Is it still in Chicago?

A To the best of my knowledge it is, but Mr. Hart is now deceased.

Q What was the reason for discussing with Mr. Hart?

A Well, our total sales organization was pretty well under Mr. Hart's supervision back from a judgment that had been rendered somewheres around 1953.

Q Do you recall the name of the case?

A Yes, the Bowman Dairy Company v. The Federal Government; and then there was some civil action, and I don't know the terminology of it, by the Dean Foods Company.

MR. McINERNEY: Would you mark this for identification as A & P Exhibit 51.

MR. MATHIAS: May I have the opportunity to briefly review this before it is shown to the witness?

JUDGE HINKES: Certainly.

MR. MATHIAS: I was handed it just before the hearing and was engaged in other work and was unable to review it.

JUDGE HINKES: You may.

MR. MATHIAS: All right, Mr. McInerney.

By Mr. McInerney:

Q Would you look at RAPX 51 and tell us, is that the Government decree to which you had reference in your prevous answer?

A Yes, sir, this is it.

Q And I believe you said that subsequent to this decree Mr. Hart was pretty much in charge of your sales operation. Why was that?

A Well, yes, he was, in this respect, that so much of my duties had to be cleared through Mr. Hart, or Mr. Hart's office in his absence. We were compelled, because of this restraining order or final judgment or whatever term this is, that we had to have list price and work on a discounted basis on the amount of milk sold to a store.

In other words, every store had the same list price and they were rebated a certain amount of money at the end of the month by check according to their category that they fell in.

Now if we had to deviate in any way from that list price - list discount system, I had to have my salespeople bring in an affidavit that would be signed by the person that claimed that they had a better competitive offer, whether it would be a better price or a piece of free equipment or a loan without interest, anything that deviated from that list-less-discount had to be verified in writing, certified by the storekeeper or the customer's signature, with our own salesperson signing it also as seeing the signature; and in turn I had to approve it and take it to Mr. Hart's office for clarification and understanding that we could meet the conditions that existed in that particular account.

MR. McINERNEY: I offer A & P Exhibit 51-A and subsequent letters in evidence.

MR. MATHIAS: No objection.

JUDGE HINKES: It is received.

(The document referred to was marked Respondent A & P Exhibit 51-A through -G for identification and received in evidence.)

MR. McINERNEY: That is 51-A through -G, may the record note.

By Mr. McInerney:

Q Before you brought your letter of August 31, 1965, your letter offer over to Mr. Schmidt, was this proposal reviewed by anyone else on behalf of Bowman? You mentioned the senior cost accountant, Mr. Parmalee; the attorney, Mr. Hart; and yourself.

A Yes, sir, it was reviewed and agreed to that I make the presentation, by our president, who was then T. J. Kullman, and our board chairman Francis Kullman.

Q Would you tell us what happened next. I am going back now to a point where I interrupted myself and you, and I apologize. What was your next contact with Mr. Schmidt with respect to this proposal subsequent to the meeting you describe in July 1965?

A I believe the exact date that is on the letter, I presented that proposal to Mr. Schmidt at his office on Pulaski Road in Chicago.

Q What did you say to him, and he to you, on that occasion?

A He reviewed it thoroughly. When I say "thoroughly," I mean by asking me a question or two as to the areas and servicing of the accounts and such things as this, could we handle it, could we reach certain areas, because it was in far-reaching areas, but we did have branch offices or branch distribution stations every place that is mentioned in that contract we could have reached within reason of delivery systems.

We didn't get too deeply involved in the other details. He wanted to study it, meaning the pricing.

As I recall it, our meeting was not too long at that time.

Q What was your next contact thereafter with Mr. Schmidt with respect to this?

A Again guessing at time periods, it was a week or so or maybe a little bit longer, I had a phone call asking if I would come back to the office to discuss in detail some of the points that he had gone over with his superiors at the Tea Company.

So we subsequently made a date for me to come over, and he reviewed the private label pricing with the standard label, as we call it, or the Bowman label, and why we would sell them both items at the same price. I discussed my own and our company's philosophy on that.

Q Please tell us as best you can recall what you said to him.

A I am not a cost accountant, but in working with our cost accountants over the years and our own knowledge of cost, we could not substantiate in any way a differential between private label and brand label or standard label. We could see no savings to be had in it.

So this was our philosophy, that we could sell them either one at the same price but we didn't care to go into low-volume items in private label.

The offer was made on some around 10 or 11 or 12 items that we would give them private label or our own label, either one. All other of the 20-some items we bid on would be on the Bowman label, meaning the low-volume items.

Q You mentioned this was your philosophy and Bowman Dairy philosophy that you would sell both at the same price, private label and brand label?

A That is correct.

Q Are you aware other companies have different philosophies?

A Yes, sir, I am.

In our own company we had a private label we were putting up, not in fluid milk but in ice cream, and we sold it at the same price we did our own standard brand label to the same customer.

Q Bowman was consistent in that?

A Yes, sir. To the best of my knowledge I cannot recall that we ever had a differential between a private label and a brand label.

Q Are you aware whether or not competitors of Bowman had a different philosophy and gave lower prices for private label?

A Yes, sir, I am aware of it.

Q What was their philosophy?

MR. MATHIAS: Your Honor, I will object to speculation as to philosophy for competitors unless there is some foundation as to how his knowledge was gained.

MR. McINERNEY: I think his experience over decades, I think it is now 40 years in the industry, I think he is qualified to answer the question.

JUDGE HINKES: Only if the philosophy, which involves a mental response, was communicated to the witness. I think you would have to demonstrate that he knew their philosophy, which is something different from knowing their practice.

MR. McINERNEY: I will rephrase the question.

By Mr. McInerney:

Q Have you from time to time, Mr. Cannon, heard from customers of yours that they could obtain better prices on private

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Q Have you become aware of other competitors who have similarly priced private label offers at lower prices than their own brand label?

A Yes, sir.

Q On the basis of that experience is it fair to conclude that other companies have a different philosophy with respect to private label pricing than Bowman did?

MR. MATHIAS: Again we are getting back to philosophies and there is no showing of contacts in this line of questioning between the witness and the other dairies so that he would be qualified to speak as to their philosophies.

JUDGE HINKES: I think I must sustain the objection. I think we understand what the practice was from this witness' experience and that is about all we can go into.

By Mr. McInerney:

Q With respect to this attitude of Bowman of price private label the same as its own brand label and specifically with respect to your offer to that effect to A&P, was there some advantage to Bowman to having A&P accept the Bowman label at the same price instead of the private label? Do you understand my question?

A Yes, sir.

I think there was an advantage not only to the Bowman Dairy Company, but to the A&P Company also in having them priced at the same label. The advantage to us was that we had a highly advertised brand name and if you have ever worked in marketing or merchandising work, the name of the Bowman Dairy Company was well known from as far away as European companies that came to visit us because of our system, our merchandising and marketing ideas.

We thought we could do a better job with the Bowman label in marketing and merchandising for the Tea Company. The change for the Tea Company in getting a private label is they can make a change quicker and rapidly from one supplier to the other because they have now impregnated the market with a new name and built it up. But they would have had to spend considerable merchandising and advertising money to build up that label they were going to use, whatever the name was going to be.

Q The replaceability advantage that you spoke of, if my question is clear, if not I will rephrase it, was that an advantage to A&P, that is, that they could replace their supplier more readily once they had their private label in their store? On the other side of the coin, would that be a disadvantage to Bowman?

A Absolutely, yes, it would.

Q In your talks with Mr. Schmidt did you try to persuade him to take to the Bowman label rather than the private label?

A I did, yes, very strongly.

Q You were telling us of your discussion with Mr. Schmidt subsequent to the submission of this offer which has been marked

A&P Exhibit 50, you said the private label being offered at a same price as your brand label was one of the subjects discussed. What other subjects were discussed at that meeting?

A He asked me to point out where our profit came from in the quotation, the quotation was broken down in columns with all different headings, our profit was in the second column, I believe, on page G in what we call markup.

Q I am placing before the witness A&P Exhibit 50-G and asking him if that is the page to which he referred in his previous answer.

A That is correct. That is the page I referred to.

Q The second column on that page is entitled "Markup"?

A That is correct, yes, sir.

Q What did you tell Mr. Schmidt about what that markup included?

A That included a markup of approximately 6 percent gross for the Bowman Dairy Company. This is the thing that he wanted cleared up for his superiors who had asked him the question, as I understood it.

Q Was that in accordance with his previous conversation with you that he wanted to make sure Bowman was making a profit?

A That's right, yes, sir.

Q Now, what other subjects were discussed at this meeting between you and Mr. Schmidt?

A One of the points he made was did we take into consideration here any savings for pre-ordering of merchandise?

A We had not.

Q What did you say on that subject?

A There was no pre-requirement that he had to pre-order.

Q Was there any savings if he agreed to pre-order the merchandise?

A Yes, there was.

Q Was that something you discussed with Mr. Schmidt?

A Yes.

Q Did you tell him how much more he might save under such a situation?

A No, sir, I had nothing to tell him and he showed no interest in it. I might add most storekeepers don't take much interest in pre-ordering.

Q Was anything else discussed on that occasion that you can now recall?

A Not on that visit, no, sir.

Q Would you take a look at A&P Exhibit 50, which is now before you, and just glance over that and see if it refreshes your recollection in any way as to any other subject that came up?

Let me direct your attention to the second paragraph on page 1 which starts out "These quotations were developed by our accountants on an estimated total dollar volume of approximately $1 million." Was that a subject that was discussed by you and by Mr. Schmidt?

A Yes, to a small degree we discussed it as to how I arrived at it and it wassomething that was rather difficult to do; as I stated earlier we had been given no specifications or no dollar volumes to work with for the A&P Company, only a list of stores. We sent our merchandising staff out to each A&P store and counted the counter facings in the dairy case.

Q Will you please explain what "counter facing" consists of?

A Facing is an individual carton and they normally will put six to eight half-gallons across, six to eight facings in the dairy case and maybe put alongside of it three to four casings of quarts. Our merchandising staff, we felt, was confident enough by the display in the dairy case they could estimate the volume of the store.

This is the way we arrived at the million dollar digure we used for volume per month.

Q Your letter continues, approximately $1 million per month, 26 delivery-days, using Chicago list prices. Would you explain what Chicago list prices are?

A The list price is prices used in billing into the store at the store level.

Q Is that the price that you were changing the customer?

A In this case we were charging the store this price, but it would not be the price the A&P would pay for the merchandise.

Q Would you explain the difference please?

A Yes, they didn't want their cost prices in the hands of their store level people and between us we would agree to determine a given figure as to what we would charge the stores as a billing price, or a list price, call it either way.

Q Now was that practice of billing the store at a price which was different than the net price that you would charge the customer, a standard practice in chain stores?

A Yes, sir, it was.

Q Looking at Respondent A&P Exhibit 50-T, would you please tell us what that is?

A The sheet has two lists on it, two price lists. One is the chain store wholesale list, or what we bill the store on a given day for merchandise delivered. In other words, the manager of that store would assume that this was what it cost him that day for merchandise.

Q And for internal bookkeeping purposes the store would be charged that amount, is that correct?

A That is correct, yes, sir.

Q Was this sheet that is marked Respondent A&P Exhibit 50-T, is that a sheet that was in use at approximately the date it bears, August 23, 1965?

A That is correct, yes, sir.

Q For some other customer of Bowman Dairy and not A&P, is that correct?

A Yes.

Q What relationship would there be between the list prices to which you refer, Chicago list prices to which you referred in your letter and the price actually charged the chain? In other words, the net price. Could you give us some idea?

A Well, the "in-store" price is probably 50 percent less than -- or more than, I should say, 50 percent more than the actual cost or the price billed to the Tea Company office.

Q When you say the "Tea Company"?

A The A&P Tea Company.

Q Is that the practice used with other chains as well?

A Yes, sir.

Q Now referring to A&P Exhibit 50-N, which is entitled Net Delivered Prices, looking at that, can you tell us approximately the difference that there would have been between the so-called list price chain stores and the net price A&P would have been paying under your proposal, assuming you sold all the A&P stores?

A If we sold all the A&P stores and they had accepted our quotation as presented, using the first item, "quarts of homo-V.D.," their cost to them would have been .1696 per quart deliverdd their store. The difference between that and the -- I am looking for the other exhibits.

Q Does this Exhibit 50-N show the list price to chain stores?

A Yes, it does. If you will relate it to the 26.5 cents, this price to the chain store, you will see in that particular case it is even more than 50 percent markup.

Q Going back to the portion of your letter that I have quoted referring to an estimation of approximately a million dollars a month, using Chicago list prices, just to carry out the calculation, if we were to assume that the total business involved here was, say, $10 million at the net prices, what would the Chicago list prices be?

A Chicago list prices then would bring the $10 million to approximately $15 million.

Q Was a volume of approximately $1 million a month at list prices a precondition to the offer that you were making in your letter of August 31, 1965?

A No, sir, it was not.

Q If A&P had given Bowman the business in all of its stores, even if that fell somewhat below the $1 million a month at Chicago list prices, would Bowman have delivered in accordance with this offer?

A Yes, sir, we would have.

Q Was the use of the term "Chicago list prices" and what you meant by that? Was that a subject that you and Mr. Schmidt discussed at this meeting that you have just been describing?

A Not in any great detail, no, sir.

Q You mentioned that there was some brief reference to it. Can you tell us what the reference was?

A Yes, the only reference was we used it to determine the million dollars a month figure that we estimated the Tea Company was then purchasing.

Q Another exhibit in this case, which is Commission Exhibit 50-A, has a notation at the lower left-hand corner in Mr. Schmidt's handwriting, "Gross-retail." This copy is very difficult to read, but I don't think there is any question about that. This is "Gross-retail."

Does that refresh your recollection as to what you said to Mr. Schmidt with respect to Chicago list prices?

A Yes, I would guess that it meant this ---

MR. MATHIAS: Your Honor, I will object to a guess unless Mr. Cannon can recall what the statement means. I think it has been established this was not his writing, but Mr. Schmidt's.

By Mr. McInerney:

Q Will you tell us as best you recall?

MR. MATHIAS: If he knows, Your Honor.

JUDGE HINKES: Yes, we want factual information, Mr. Cannon. We don't want a guess.

THE WITNESS: Your Honor, I think I can bring it out clearly.

It is a matter in reference to what the word "retail" means. Retail is the out-of-store price at the level of the store, what they sell to Mrs. Consumer at.

2310 If you will note, in most cases the retail pricing is very close to what the list wholesale pricing is. There is some deviations, there is no question about that. He would refer to anything out of store as retail pricing, where I would refer to it as list or wholesale price.

By Mr. McInerney:

Q Those were roughly comparable, is that correct?

A That is correct. Some of our chain accounts, to further clarify it, they were identically the same, they would tell us what to charge the store and that same list price that we were told to charge the store was then used as the selling price to Mrs. Consumer.

JUDGE HINKES: The store's profits came from the rebates or discounts, is that it?

THE WITNESS: In this case it was direct net billing, there were no discounts.

JUDGE HINKES: That is in the case of the bid you were making?

THE WITNESS: That is correct.

JUDGE HINKES: I mean for the stores.

THE WITNESS: It would be discount, yes.

By Mr. McInerney:

Q Can you tell us ---

MR. MATHIAS: If we are going to get to another page or another subject, could we have a five-minute break? We have been in session for some time. I believe we could all use a few minutes.

JUDGE HINKES: Yes, we will take a short recess.

XXX

(Whereupon, a brief recess was taken.)

JUDGE HINKES: You may continue, Mr. McInerney.

By Mr. McInerney:

Q You have before you, Mr. Cannon, A&P Exhibit 50-N, a page to which you referred previously this morning, and I believe you told us that the net prices shown there were being offered to A&P in the event that you were to supply -- that is, Bowman were to supply all of its stores, is that correct?

A That is correct, yes, sir.

Q In the event that something less than all of the stores were to be supplied by Bowman, were there alternative pricings that Bowman was offering to A&P?

A Yes, sir, there were. There were two alternates.

Q What were they?

A One for 70 percent of the stores, which is on the same page, and one for 50 percent of the stores, that is on the same page.

Q Now you told us previously that you consulted Mr. Hart and his law firm with respect to this offer. I am not sure whether we have it yet in the record. Did Mr. Hart approve your submission of this offer as being a legal offer?

A Yes, sir.

MR. MATHIAS: I am going to object to a legal conclusion in here. I have no objection to his asking whether Mr. Hart approved the offer or not, but I think the term "legal offer" in here is a conclusion.

JUDGE HINKES: I think the simplest conclusion is to ask him what Mr. Hart told him.

By Mr. McInerney:

Q Tell us what Mr. Hart told you.

A The night before this presentation of the bid was made, Mr. Hart, Mr. ---

MR. MATHIAS: Excuse me. I apologize for the interruption, but the problem with the question you have now asked is one ruled upon by Your Honor in connection with statements by one of our witnesses of a deceased associate and the problems of hearsay raised by the fact that the other party is now deceased. There is no way we can cross-examine Mr. Hart. He is now dead. I believe the testimony of Mr. Holin concerning his business associate was stricken on the ground it was not allowable under these circumstances.

MR. McINERNEY: This is part of the submission of a very important bid to A&P and we are just asking for the recitation of what, in fact, occurred on the night before the bid occurred, I think it is part of the res gestae and I think it is highly material.

JUDGE HINKES: I think I must allow this question, although I realize the difficulties of checking back where the person who made the statement has died. Nevertheless, I think under the circumstances, where the dispute apparently is between whether the attorney gave a legal opinion or just an opinion, the only solution to that controversy is to simply ask the witness what the attorney said and we will draw our own conclusion as to what kind of opinion was rendered.

Since that is the area of the dispute, I think this is simply the quickest and cleanest way of finding out what was said.

You may answer, Mr. Cannon.

THE WITNESS: Mr. Parmalee, Mr. Hart and myself had dinner the night prior to my presenting this bid to the A&P Tea Company. I will have to assume it was on August 30 because I am sure this was presented on the 31st. We reviewed in detail the entire quotation.

Mr. Hart actually helped me write the letter that is on pages 1 and 2 of the quotation and it was with his approval and best wishes that I presented this bid to the Tea Company the following day.

By Mr. McInerney:

Q I think you told us it was customary in submitting offers of this kind that you did review them with your attorneys ever since the time of the Government decree to which you referred?

A That is correct, yes, sir.

Q And even in meeting competitive offers, you would not meet competitive offers without a written statement from the customer who got the competitive offerers witnessed by your salesman and submitted to Mr. Hart, is that correct?

A That is correct, yes, sir.

Q In submitting this quotation, you were not meeting a competitive offer, were you?

A No, sir, we were not.

Q Did Mr. Parmalee review the offer from the point of view of cost accounting?

A Yes, sir, he did.

Q Did he also approve the offer?

A He did.

Q Incidentally, were variations from published list prices or published discounts of dairies fairly common in the Chicago area at the time to which we are referring?

A Yes, sir, it was very common.

Q Was it difficult or easy for you to find out what your competitors were offering customers such as A&P or other chain stores?

A In the major accounts it was very difficult.

Q Was this regarded as a trade secret by members of the dairy industry?

A I believe so, yes.

Q Would you have any way of knowing what other people were quoting to A&P for this business?

A No, sir, none at all.

Q On what basis were the prices offered by Bowman in A&P Exhibit 50 for the milk products? On what basis were they being offered in terms of the butterfat content of the milk? What was the butterfat content?

A They were offered on the basis of a 3.5 butterfat content.

Q Is that reflected in your letter marked Defendants Exhibit 50?

A I believe it is, yes.

Q At the time that Bowman had been supplying A&P with milk prior to 1958, about whichy ou have testified ---

MR. MATHIAS: Excuse me, I hate to interrupt, but could I have the last question and answer read back? There was a page reference that escaped me.

JUDGE HINKES: Read the question and answer.

(The reporter read the question and answer.)

By Mr. McInerney:

Q You have told us previously that prior to 1958 Bowman supplied A&P with milk and that sometime in that year Bowman was rather abruptly cut off by A&P, is that correct?

A That is correct, yes, sir.

Q Did you have any long-term contract with A&P or were they free to cut you off?

A No, sir, we had no contract at all. They were free to cut us off.

Q Is that typically true with respect to supplying chain stores?

A That is correct.

MR. MATHIAS: I will ask that the witness be limited to his own knowledge.

JUDGE HINKES: Yes, we are interested only in what you can supply from your own knowledge.

THE WITNESS: I will not deviate from that. These are the facts as I know them. There were no long-term contracts in all the accounts I visited in the City of Chicago and tried to do business with.

By Mr. McInerney:

Q Now when you were supplying A&P, do you know what the butterfat content of the milk was?

A Yes, sir, I think it was -- I firmly believe it was at 3.5 percent butterfat or higher. My reason for believing that that far back, which is a long time ago, is the great to-do we made in promoting our product on the street and talking about the high butterfat content of the product. The two Kullman brothers, the principal owners of the company, made us highlight that all the time, that we sold milk at much higher fat content than anybody else.

Q Now, if A&P had asked you to supply a 3.4 percent butterfat content in supplying milk to them, would a cost saving have resulted in doing so?

A Yes, sir, it would have.

Q Would Bowman have supplied it at 3.4?

A We would have supplied it at anything down to the limit of 3.35 percent for the State of Illinois.

Q Can you give us some idea of why there is a saving involved in a reduced butterfat content? First of all, is it a difficult operation to reduce the butterfat content to the desired percentage?

A No, sir, it is not. It is a matter of the separation of the fat from the milk.

Q Is there always, or is there usually some separation of fat from milk?

A It is done every day.

Q And does it cost any more to reduce it down to 3.5 or 3.4 or 3.25? Is there any difference in cost?

A No, sir, there is none.

Q What happens to the butterfat that results from that separation? Is that a valuable commodity?

A Yes, sir, it is. If you are in the manufacture of ice cream, you would use it in your own company, the butterfat, to use it for the manufacturing of mixes that would go into ice cream, or you can sell it on the open market to people who do make mixes and ice cream.

Q Does butterfat have a recognized market value on the open market as butterfat?

A Yes, sir, very definitely.

Q In your dealings with Mr. Schmidt with respect to this proposal of Bowman's to supply A&P, were you able to tell whether Mr. Schmidt was very knowledgeable about the dairy industry and purchases of dairy products?

A No, sir, in my own humble opinion, I didn't think very highly of Mr. Schmidt's ability at all. Being a member of the trade associations in the area, there were many of us that felt the same way about it.

Q In the event that A&P wanted some butterfat content which might be different from the butterfat content at which Bowman was supplying other customers and had accepted your suggestion that they take it in Bowman-labeled milk, would that have caused any insurmountable problem?

A No, sir.

Q How would you reconcile any difference?

A Really, we would standardize down to the 3.5 fat for the filling purposes, for the product, and of course the cartons would just be run at a separate time from the others that might want a different fat content. We would have to separate them and that would be not a factor, though. It would be nothing more than a separation of product in the cooler later on for cooling purposes.

Q Was Bowman supplying other purchasers of milk with milk at butterfat content other than 3.5 at the time of this offer?

MR. MATHIAS: Your Honor, I would like the witness to be instructed again that the question should be answered if it is within his own knowledge. I do not believe that the background of Mr. Cannon, as stated in his earlier testimony, has shown that he had anything to do with the processing end of the operations of Bowman Company.

JUDGE HINKES: If this is within your own personal knowledge, you can answer the question.

THE WITNESS: I can't answer that I know it, no, sir.

By Mr. McInerney:

Q Now you were telling us about your meeting with Mr. Schmidt on the occasion of his calling you to explain certain facets of the offer that you had submitted to him, which has been marked A&P Exhibit 50. My question now, sir is, is there anything else that you recall about that conversation?

A Yes, there sure is. I came out of the meeting very elated. I might add ten feet tall, thinking I had secured the business. It was an impression left with me by Mr. Schmidt at that meeting. Not that he told me anything or said that I had it, but buyers have a way of indicating to you when you have done something good, or you are in a good position and even to this point I reported back to my superior, who was the president of our company, that he had promised me after I told him how I felt that I would be properly rewarded for my good work. It never turned out that way.

Q How did you learn it didn't turn out that way?

A After a period of time, it could be two weeks, a little bit less or a little bit more, I didn't hear anything further from Elmer about it and I called him on the phone. I told him I was quite anxious and I went on to explain all the things we had to get into such as getting a supply of cases in because when you take on some 250 stores, whatever the exact figure is, you can multiply that by the number of cases you need and we have what we call a float factor of five to seven cases per store for tripage.

It would mean maybe some 30,000 or 40,000 or 50,000 cases we would have to order and get supplies. I went into some detail like this with them, kind of pushing me to get the answer. I got the answer, just simply this, that he and his company had reviewed it, his superiors had reviewed our quotation and again the other quotations and there was such a little difference between the two that they had decided not to make any change.

Q Did you have any further contact with Mr. Schmidt from that day to this?

A None that I can recall, no, sir.

Q How long were you with the Bowman Dairy Company in all, approximately how many years?

A 32 and a half years.

Q To the best of your knowledge and belief, what was the attitude of the Bowman Dairy Company at this time in 1965, the time that you submitted the bid to A&P with respect to compliance with the Robertson-Patman Act?

A I believe we were adhering to it as exactly as we could, from a layman's point of view.

Q Was this a subject that you had conversations with Mr. Hart on, as you indicated previously on a number of occasions?

A I think it was daily with Mr. Hart or one of his attorneys in his office in his absence.

Q Did you comply with their advice with respect to compliance with the Government decree?

A I had to under threat of discharge if I didn't, if I was found no complying with what the lawyers had told me I had to live with.

Q Did you, in fact, comply with what the lawyers told you?

A I did, yes, sir.

Q Was that also true on this particular occasion, your compliance with your lawyers' injunctions and advice?

A Yes, sir.

Q Was this system of -- excuse me, let me rephrase that.

If A&P had accepted this offer, was Bowman prepared to offer the very same prices to its other customers such as Kroger and ~~Hi-lo~~ High-Low?

A Yes, sir.

MR. McINERNEY: We have no further questions.

JUDGE HINKES: Mr. Mathias?

MR. MATHIAS: Your Honor, complaint counsel in proceeding with cross would like to ask A&P counsel if they have any signed statements of ~~the witness~~ the witness in their possession.

MR. McINERNEY: Yes, we do.

MR. MATHIAS: Complaint counsel would like to review that signed statement before cross-examination.

MR. McINERNEY: I am not sure there is any requirement that we supply that, Your Honor. I wonder if we might have it understood that we have a reciprocal arrangement with respect to any such statement complaint counsel has.

MR. MATHIAS: I believe complaint counsel has long since turned over any signed statements we have of any witness.

JUDGE HINKES: In any event, complaint counsel is on demand required to turn over to you any statements of a witness so you may be assisted in your cross-examination of ~~that witness.~~ that witness

MR. McINERNEY: I believe that complaint counsel had a lengthy interview of Mr. Cannon and I wonder if they didn't make some notes with respect to that interview.

JUDGE HINKES: That is another thing. Notes made with the attorney are not turned over. This is the Jencks Act provisions that govern the document that must be turn over is a document which has been prepared or adopted by the witness who is on the stand. The attorney's work papers and notes are not such documents, of course. So you would not be entitled to that nor would you be obliged to turn that over to complaint counsel either.

MR. McINERNEY: ~~THE WITNESS:~~ If I am not mistaken, I may well be, but I think the Commission has instructed complaint co-nsel to make these statements as verbatim as possible when they take them down and this was a recent event.

JUDGE HINKES: That is true, if it is verbatim and it can be demonstrated to be, then of course you are entitled to it because that is an adoption by the witness. If on the other hand, it is the attorney's own statement, even though it may be verbatim, if it is the attorney's statement, there is nothing that you can use simply because the witness on the stand has not adopted that statement as his own and he has no way of knowing that the attorney has recorded everything quite faithfully.

MR. McINERNEY: ~~THE WITNESS:~~ What I am really asking, and I think Mr. Mathias can help us if he will, is whether in interviewing Mr. Cannon, complaint counsel followed the procedure that I understand the Commission now recommended as taking down as a statement as close to verbatim as possible.

MR. McINERNEY: ~~MR. MATHIAS:~~ First, is there a request in from A&P counsel for any interview report? We have made a specific request. Is a request being made by A&P counsel?

THE WITNESS: Yes.

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MR. MATHIAS: I will note Commission counsel forwarded a copy of that report to Mr. Cannon. If Mr. Cannon feels it is a reasonable outline of our conversations the day we met with him in Canton, I have no objection to turning it over to A&P counsel.

By Mr. McInerney:

Q Have you received such a report?

A Yes, sir.

May I add to that?

JUDGE HINKES: Yes.

THE WITNESS: I was also requested by someone in Mr. Mathias's group if I would give them a copy of Mr. McInerney's statement and I said, no, I didn't feel free to do that. I was trying to be a fair and honest witness so I declined. I believe I would have declined Mr. McInerney had he asked the same question last night.

JUDGE HINKES: The question is, is the statement that you received from Mr. Mathias correct, and did you adopt it as your own?

MR. McINERNEY: May I address myself to that question?

JUDGE HINKES: Yes.

MR. McINERNEY: I have no idea how detailed this is and I believe the interview lasted several hours and I think it is a difficult thing for any witness to answer as to whether he adopts it. I am not pushing his adoption of it as a basis on which I will receive it. I think that puts too much of a burden on the witness at this stage when he has only had it a few minutes on the stand.

I am simply asking Mr. Mathias whether he is agreeable to giving me what he has given Mr. Cannon.

MR. MATHIAS: I will not do so if it is only my work product. If it is a fairly accurate representation of my interview with Mr. Cannon, I would have no objection. I believe in normal events we would submit the interview to you and you could decide whether it was essentially verbatim and you could decide it was disccoverable. Mr. Cannon has a copy, if it is a substantially accurate recordation of our interview, then complaint counsel have no objections.

MR. McINERNEY: I take it Mr. Mathias is saying, no, he will not give me the statement he gave to Mr. Cannon.

JUDGE HINKES: He will if Mr. Cannon will say it is a correct version of their interview.

MR. McINERNEY: I submit that is too great a price for me to pay to get reciprocal treatment from Mr. Mathias.

I will mark for identification the statement that Mr. Mathias has reference to, which is an affidavit of Mr. Cannon, dated February 5, 1973. Would you mark that as A&P Exhibit 52 for identification.

I would offer it in evidence.

MR. MATHIAS: I don't think that is necessary. All

I want to do is read it.

JUDGE HINKES: If that is the purpose, just to assist counsel in examination, it does not and should not become part of the record in this proceeding inasmuch as it is -- well, it is not evidence as such.

MR. McINERNEY: In any event, I think it might become evidence, Your Honor.

JUDGE HINKES: In that event we will hear further, but at this moment it is not. In other words, there is no reason for introducing a statement of a witness who is presently on the stand unless you are seeking perhaps to impeach that witness, which I am sure you are not.

MR. McINERNEY: Of course not, since Mr. Mathias seems to think this is so material and he is taking, I think, the unusual position of seeming to think that he is entitled to this, I thought it might also be evidentiary, but let's let it go the way it is, it is marked for identification.

XXX (The document heretofore referred to was marked for identification A&P Exhibit 52-A through 52-F.)

MR. MATHIAS: I note it is five minutes to 12 and it will take some time to review this. Could we take our luncheon break so we can review this?

MR. McINERNEY: I think Mr. Cannon has a plane to catch this afternoon. Could we make the luncheon break as brief as possible?

JUDGE HINKES: Off the record.

(Discussion off the record.)

JUDGE HINKES: Back on the record.

We will recess at this time and resume in this room at one o'clock.

(Whereupon, at 12 o'clock noon the hearing recessed, to reconvene at 1 p.m. of the same day.)

AFTERNOON SESSION

1 p.m.

JUDGE HINKES: You may cross-examine, Mr. Mathias.

FRANK T. CANNON, SR. resumed the stand and testified further as follows:

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CROSS-EXAMINATION

By Mr. Mathias:

Q From your direct testimony it would appear your dealings with A&P and Mr. Schmidt ended mid-September 1965, is that correct?

A That is correct.

Q When were you contacted by counsel for any of the parties involved in these proceedings?

A I would guess about 12 or 13 months ago.

Q I note that the affidavit which you provided to A&P counsel was dated February 5, 1973. Would it have been much before that date, sir?

A No, not an awful lot.

Q About how many days or weeks before that?

A I would be hard pressed to say, it may have been a week or so.

Q But relatively near that date, within a couple of weeks?

A Yes.

Q I believe you also stated on direct that at that time you had not even recalled that you had the carbon copy of that offer in your possession, you found it at that time; is that correct?

A That is correct.

Q I note, as I previously stated on the record, that the statement that you provided to A&P counsel at that time was in affidavit form.

MR. MATHIAS: Your Honor, I would like you to instruct Mr. Cannon at this time that he is under no criminal penalties or any other penalties if his sworn statement that was given to A&P counsel at that time should have been abrogated in any way by later thoughts that he had on the matter or by any questioning that might occur in this proceeding. In other words, if there should be any conflict between testimony here and anything stated in that sworn affidavit that it places no legal responsibilities upon Mr. Cannon.

MR. McINERNEY: I don't see any need for that, Your Honor.

JUDGE HINKES: I don't know that I could give him any such assurances. The only thing I could say to Mr. Cannon at this point is that we want the truth, the whole truth and nothing but the truth. Insofar as that may differ from anything he may have sworn to in the past, I am in no position to give him any comfort.

THE WITNESS: May I make a statement?

JUDGE HINKES: Yes.

THE WITNESS: I think you can appreciate when Mr. McInerney contacted me originally, I had not been sitting or thinking about this for the last eight or ten months, or a year, and as I mulled things over in my mind during the past 12 or 13 months, a lot of things have come back that I may not have remembered or accurately stated in the statement you are pointing out.

MR. MATHIAS: That is all I wanted clear on the record, that this might be the case.

MR. McINERNEY: I don't want any inference drawn from that that there is anything inconsistent between the affidavit and anything that has come out thus far.

MR. MATHIAS: Counsel has made no such statement.

MR. McINERNEY: I don't understand the whole exercise at this point.

MR. MATHIAS: Since I have been put to the question, I just wanted to allay any fears by Mr. Cannon in connection with the fact that he had made a prior sworn statement and make it clear on this record that he may have gone through some process of mulling over and refining his thoughts as to this matter subsequent to the time that he gave that sworn statement.

JUDGE HINKES: Be that as it may, let's have the testimony of the witness.

By Mr. Mathias:

Q Sir, you have stated in some detail your various positions held with Bowman prior to the time Bowman sold out to the Dean Milk Company. In connection therewith you made reference to the fact that Bowman's operations were well known and that people came all the way from Europe to study your various methodologies. In that connection, sir, how many plants were operated by Bowman in the Chicago area at this time period in the early and mid-1960s?

A Did you say plants, production plants?

Q Yes, sir, processing plants, milk-processing plants?

A I believe there were three -- Elston Avenue, State Street, River Forest and General Office. I'm sorry, there were four.

Q Of these which was the principal plant of Bowman? Was there one main plant?

A Well, the one that did the most volume was the River Forest plant, but all performed the same functions, to lesser degrees in some cases.

Q Sir, when you state that people came from as far away as Europe to observe your processes, was there anything special about Bowman's operations in Chicago at this period of time?

A Well, I would call it special and I think a lot of other people did, too. We were known as the largest independently owned dairy in the world. When I say "independently," it was family-owned, family meaning interrelated family. This was quite unheard of after the '50s that many families were able to continue on with such large companies as we had.

Q Were the facilities of the Bowman Company in the Chicago area modern and efficient?

A In my personal opinion, I felt so, yes.

Q In connection with your duties with Bowman, had you had anything to do with the keeping of the plant facilities of Bowman up to date?

A For a three-year period I did, yes.

Q What were those duties, sir?

A I was the liaison man from the Sales Department to work with the production and distribution people to put in more efficient operations.

Q When was this, sir?

A The late '50s, maybe early '60s. I am vague on that date.

Q What role did you play in this efficiency process?

A The planning of it.

Q The planning of the operations?

A Yes, sir.

Q This would be at the plant level?

A Yes, sir.

MR. McINERNEY: I have not been objecting, but I do think this is beyond the scope of the direct. My only reason for saying that is that I hope it will be shortened.

MR. MATHIAS: It is not beyond the scope of the direct. This witness stated the Bowman operation was quite well known as far away as Europe, people came from there to examine their operations. It appears I am entitled to explore why they would do so.

JUDGE HINKES: You may go on.

By Mr. Mathias:

Q And were there any special features put into your processing plant at that time that you can recall that made it more efficient?

A We felt they were, yes.

Q What were those features?

A The loading type of operation we used from filler to truck without a stop.

Q This was a mechanized loading process?

A That is correct.

Q Directly from the filling machines to the truck?

A Right into the route trucks that went out.

Q In this connection you state that Bowman was a very large independent in this market. What was Bowman's position in the Chicago market in the late 1950s and early 1960s relative to volume of sales?

MR. McINERNEY: I think I am going to object. At some point I think the cross-examination ought to be limited to the direct.

JUDGE HINKES: That is the general ground rule that has been laid down here.

I am not sure I understand, Mr. Mathias, where you are heading to. I gather this is more or less groundwork that you are laying.

MR. MATHIAS: Yes, sir.

JUDGE HINKES: But let's get to the point, if we can.

MR. MATHIAS: I will strike the question.

By Mr. Mathias:

Q In connection with your dealings with A&P you testified that there was some questioning by Mr. Schmidt as to your ability to serve all of the areas where the A&P stores were located. Did the Bowman distribution network cover all the areas where the Chicago units of A&P were located?

A Yes, sir.

Q Did Bowman have its own distribution branches throughout these market areas?

A Yes, sir.

Q Did it have its own routes in these market areas?

A Yes.

Q Did Bowman have wholesale routes in Lake and Porter Counties in Indiana, for instance?

A Yes.

Q Those were Bowman's own routes?

A If I had the map of Lake and Porter Counties in front of me, I might answer that more accurately.

Q I believe there is one in CX-50. Is that before you?

I put before you Respondent A&P Exhibit 50-I, which I believe is a map of Indiana.

A Can you tell where Lake and Porter Counties are at? Can you help me?

Q Basically what I am concerned about it in the areas of Gary, Hammond, East Chicago.

A Yes, we had a distribution point in Gary proper.

Q You had a distribution branch located there?

A Quite a large one, yes.

Q That was only distribution, no processing?

A No processing, that is correct.

Q The milk would be transferred there from one of your processing plants?

A That is correct.

Q Did your routes run as far as Valparaiso, in that area?

A I believe they did, yes.

Q Other than your duties as a Laison officer at the time, there were some of modernizing your Chicago plant. Did you have any other responsibilities in connection with the plant operations, processing, et cetera, of the Bowman Company while you were with the Bowman Company?

A Yes, it wasn't actually directly connected with the plant. I was a man used to bringing people through the plant and explain the different equipments to them, how it produced, what it produced per hour, a visitation of executive-type people, as I had served a short six-month period in the plant for that purpose in my younger days.

Q You say in your younger days. Approximately when was that?

A This is back when I was with the company four or five years.

Q When was it that you would conduct these plant tours?

A When we had executive-type visitors from out of town, out of state, out of the country.

Q Did these duties continue up to the end of your employment with Bowman?

A No, we discontinued that in the '60s.

Q You were in charge of the plant up to that time?

A I can't answer it that way. I was not in charge.

Q You conducted?

A I conducted, yes.

Q But were you ever in charge of the actual plant operations or processing?

A No, sir.

Q Did you have any dealings in connection with the procurement of raw milk in connection with your duties with the Bowman Company?

A Only in working with the farm group. I used to go out and talk to the farm group, our inspectors, field inspectors.

Q At what point in your employment did you do this, sir?

A During the late '50s, early '60s.

Q What were your duties in that connection?

A Well, to solidify relations between the farm people, our inspection field men and the so-called main office people.

Q Did you have anything to do with the procurement of raw milk for the plants at any time?

A No, sir.

Q Mr. Cannon, you stated that when you were first contacted by Borden, that you contacted your superiors and then you and Mr. Parmalee and Mr. Hart worked evenings on this so that the word would not get around. Was there any particular reason why you were concerned about the word of your dealings with A&P getting around?

MR. McINERNEY: Excuse me, I think the question is a little confusing. Mr. Mathias asked about contacts by Borden.

MR. MATHIAS: I mean contacts by A&P.

MR. McINERNEY: I think it is a lengthy summarization, but if the witness wants to answer it, all right.

THE WITNESS: I would like to have the question repeated.

JUDGE HINKES: Perhaps you should restate the question.

By Mr. Mathias:

Q Mr. Cannon, why were you and your fellow executives at Bowman at this time so concerned about the possible word leaking out that you were dealing with A&P?

A First of all, employees have loose tongues if they see what is going on. It gets out on the street on you and people get to hear things confidentially that you don't want heard. The other reason it was done was to keep them from getting themselves excited over a new large amount of business.

Q Was there any reason why the obtaining of a new large amount of business was particularly significant to Bowman at that time?

A I don't think any more significant than to anybody else when they get a large piece of business. It would mean more employees and more work, and the like of that.

Q You have mentioned that Bowman sold out eventually to Dean Milk Company. When did this sale occur, Mr. Cannon?

A The actual date of the signing was January 19, 1966.

Q Were the negotiations in process at the time this contact was received from A&P?

A I wouldn't know that. I couldn't answer that. Looking back, I could assume, but I don't want to do that.

Q During the course of your working on the proposal to A&P, did you become aware at any time prior to August 31 that there were negotiations underway with the Dean Milk Company to sell out?

A There were rumors.

Q Did the president or any of your other superiors in the Bowman Company ever mention the possibility of a sale to Dean?

MR. McINERNEY: Is this prior to ---

THE WITNESS: At what point, sir?

By Mr. Mathias:

Q Prior to August 31, 1965?

A No, sir.

Q You stated in your direct in 1965 you became general manager in charge of merchandising, marketing, advertising and, I believe, some other functions. Approximately when in 1965 did this promotion occur?

A I think it was in the month of January.

Q And who had been your immediate predecessor?

A Mr. Albert A. Clarke.

Q Who was in charge of the plant operations of the Bowman Dairy Company during this period July, August and September of 1965?

A In total, are you talking about?

Q Yes, the regular day-to-day operations of the processing plants, yes.

A There were many plant managers.

Q Was there one man in charge of each?

A Yes, there was a man in charge of each plant.

Q Let's start with them. Who was in charge of each of the processing plants?

MR. McINERNEY: I believe this is also beyond the scope of the direct examination.

THE WITNESS: I would be pressed for names of persons on that level.

By Mr. Mathias:

Q Was there anyone in charge of all your processing plant operations?

A Yes, Albert Geiss.

Q Were you the only one from Bowman who had any direct contact with A&P personnel?

A At what time, sir?

Q During this period of bidding in August and September 1965?

A During this period of the quotation, I am the only one that I am aware of.

Q Mr. Cannon, you stated that when you were first contacted on the phone by Mr. Schmidt that you discussed this with your superiors and you used the words similar to the effect that you were concerned as to whether or not this might be a fishing activity to determine the market level.

What did you mean by this, sir?

A Well, I could only assume that the A&P had accepted a new increase in price from Borden and they were trying to find out at what level their pricing should be in the marketplace.

Q Was this a common practice in chain accounts?

A It wasn't unusual, that's right.

MR. McINERNEY: I think it would be proper to move to strike the answer on the basis of the assumption, but I don't want to prolong this. I am sure when Your HOnor is weighing the evidence the fact this was stated as an assumption rather than a fact will be quite clear.

By Mr. Mathias:

Q You had had experience with this type of activity from chain accounts in the past, would that be correct, Mr. Cannon?

A Yes, I had.

Q Now, Mr. Cannon, you stated that you and Mr. Parmalee and Mr. Hart worked up the quotation for A&P. I believe you said that this occurred over a two- or three-week period, is that accurate?

A That is approximate, yes.

Q I believe you also stated that your merchandisers were sent out to the various A&P stores and made estimates of the sales volume to each of these stores, is that correct?

A That is correct.

Q Approximately how much time was allotted or how much time did this take?

A That is a pretty difficult question. Our staff probably amounted to about 20 or 30 people. You can relate that to some 250 stores. I am using a guess for that figure of 250. It would take probably maybe an hour in some stores and knowing our people as well as I did, I daresay they went right in and knew the manager well enough to ask him, "What the hell are you selling?" And they would have been told.

We have people in the field for 25 and 30 years that knew everybody in their area.

Q What I was getting at was the approximate length of time it took to gather this information together?

A I would have no way of telling this.

Q Would this have been a week or two?

A I am guessing at that, about two weeks, yes.

Q Now, did A&P give you any information as to sales volumes of any individual stores?

A No, sir, only the statement I made this morning, they gave me a list of stores.

Q Sir, I know in connection with A&P Exhibit 50 that the last couple of pages of this exhibit -- that would be 50-U through 50-W -- appear to reveal your sales experiences with A&P during the period 1946 through 1957 in the sales of various milk and milk line products; is that correct?

A That is correct, yes, sir.

Q Were these sales figures used in any way to augment your estimates of the sales volumes involved here?

A No, sir, they were not. This is just a little bragging on our part, my part, I should say, to show them how much help we were to them in improving their sales over a period of time.

Q So your estimate of the sales volume then was based strictly on the stores surveyed by your merchandisers?

A Yes, sir.

Q You mentioned at one point in your direct testimony, sir, that there were other people in the Bowman operations with which you discussed this bid, or the quotation. Can you recall at the present time who those people were?

A Yes, sir, members of our Board of Directors other than myself.

Q Who would those have been at that time?

A Francis Kullman, our board chairman; Tom Kullman, our president; Gordon Adamson, our secretary. And I would believe that Mr. Geiss would even be involved. He was also a member of the board.

Q Sir, did you tell your merchandisers why they were going out to estimate store volume at the A&P stores?

A No, sir, we did not.

Q Mr. Cannon, referring to Respondent A&P Exhibit 50 ---

A Is that the quotation?

Q Yes, sir, that is the quotation. I am referring you to the first page, that is 50-A. I see that you have broken down the areas to be covered by this quotation into five areas. My question is, are those five areas the same as the area breakdown shown internally within this offer? In other words, Metropolitan Chicago would be those stores which are designated on 50-D as the Metropolitan Chicago areas and the list of stores thereunder?

A As I recall it, Mr. Mathias, this is the way the lists of stores were given to us by the A&P Company and they called these either divisions or districts, or areas, some such terminology as that. That is the way the stores were listed that they handed to us and we just kept them in the same sequence is all.

Q My question is now, if you kept them also in the same sequence, then in the body of your bid where you refer to, say, on 50-D, Metropolitan Chicago area, and list certain stores, those would conform to Area No. 1 as appearing on 50-A. Would that be a proper assumption, sir?

A I believe so, yes.

Q And then referring to 50-I, for instance, where we have the Indiana stores listed, those would be the same as the Indiana area listed in your letter on page 50-A?

A Yes, that would be correct.

Q And so forth. If we looked inside, we could also find a breakdown, I take it, on Northwestern Illinois, Central Illinois and Iowa; is that correct?

A Yes, that is correct.

MR. McINERNEY: I didn't want to interrupt, but there is no designation in this exhibit as to what is referred to on this first page of this letter as to what each of those areas encompass. I know there are two sheets entitled "Metropolitan Chicago Area." My point is merely that I think the record ought to be a little bit clearer that there is no specific page that refers back to the Metropolitan Chicago area listed on page

A. There seems to be two different pages that refer to that.

I know that Mr. Mathias only called the witness' attention to one.

By Mr. Mathias:

Q Let me refer you to Exhibit 50-D and Exhibit 50-F.

A Yes.

Q It would appear that 50-F is merely a further background of the stores as listed on 50-D, is that correct?

A Under Chicago on D, there are 96 stores. On F, that is the breakdown to the 96 stores.

Q So 50-F then, is a breakdown of the stores listed under on 50-D; is that correct?

A That is correct, yes.

Q Turning to Exhibit 50-B, which is entitled "price escalation on milk order prices", what is the purpose of the language appearing on this page? Could you summarize this for us, please?

A Well, I think it reads clear enough. Do you want me to read it?

Q No, I don't want you to read it in detail. Would it be fair to state that this page shows the amount of increase or decrease in the price of any particular product as the basic federal order cost for raw milk would rise or fall?

A In paragraph 3 it does, yes. It says for every 5¢ per hundredweight, it would increase 1/3 of a ~~per~~cent per point, or accordingly if there was a decrease.

Q That increase or decrease would be from the raw milk cost appearing in the first two paragraphs, $4.32 per hundredweight in the Chicago area and $4.37 per hundredweight in the Iowa area; is that correct?

A That is correct.

Q The first two paragraphs refer to "for 3.5 percent Class I milk products."

I would like to refer you also to Exhibit 50-S, I believe it is. This page provides for similar increases or decreases in connection with rises and drops in the raw milk cost of Class II products for cottage cheese; is that correct?

A That is correct.

Q And this is also quoted on a Class II, 3.5 percent milk basis; is that correct, sir?

A That is correct.

Q Referring to Respondent A&P Exhibit 50-G, there are a number of products listed hereon involved in your price quotations. Are you familiar with which of these products would be Class I milk products?

A I don't have it as clear in my mind from Chicago as I used to have, but I think the only thing that is on that page that is not Class I are the last two items, yogurt and snack dip. Again, I have to say that because snack dip could have been an imitation base and I just don't recall whether it is or not.

Q It is your present recollection all the other items ---

A All the other items should be Class I, according to my recollection of the rules and regulations at that time.

Q Sir, what was the butterfat content of Sta-fit? I see you have it in half gallon and quart items in your offer.

A I believe Sta-fit was -- let me get that straight --

Sta-fit was a product that was 5/10 of 1 percent and 6/10 of 1 percent butterfat content.

Q Was this a fortified product, sir?

A Yes, it was.

Q I believe we have had explained by previous witnesses that by fortification, that is the addition of vitamins and other additives?

A That is correct.

Q Do you know whether there were milk solids, non-fat, added to that product?

A I would have to say, yes, to that.

Q Now, the 2 percent milk, what would be the butterfat content of that milk, sir?

A It should be 2 percent. That is a label requirement.

Q Among the items -- another one of the items is whipping cream. What would be the approximate butterfat content of that product, sir?

A The legal requirements were 3.2 percent but it frequently went beyond that when we had a surplus of cream and nowhere to go with it.

Q In half & half, what would be the approximate butterfat content in that?

A I believe Illinois State law requirements were 12 percent.

Q What were the minimum requirements, Illinois State requirements of butterfat of homogenized at that time?

A 3.25. Of Illinois?

Q Yes.

A I won't try to answer that.

Q Of Chicago?

A Of the Chicago-shed, it was 3.25.

Q Sir, is there anyplace on Respondent A&P Exhibit 50-B where it is stated that the homogenized milk to be sold to A&P under this quotation, if accepted, was 3.5 percent butterfat?

A No, but ---

MR. MATHIAS: I would like the witness to be asked to respond just yes or no to that.

MR. McINERNEY: I object. I think he should be allowed to respond fully.

JUDGE HINKES: I think the witness should be provided the opportunity to respond fully.

THE WITNESS: As you stated, Mr. Mathias, it doesn't specifically spell out 3.5 butterfat, nor does it say there should be less than 3.5 percent butterfat.

JUDGE HINKES: Was there anything in your bid that would prevent you from lowering the butterfat content from 3.5?

THE WITNESS: We could have gone down, sir, anything to 3.25 according to law. It is my recollection and belief that we bid at 3.5.

JUDGE HINKES: But is there anything in the contract, that is in the bid offer, that would have prevented you from going down?

THE WITNESS: I don't quite know how to answer that for you. I am trying to follow the question.

JUDGE HINKES: You have a quote, that is Exhibit 50. That quote has certain specifications. Were any of those specifications such as to prevent you from fulfilling the contract at 3.4 butterfat?

THE WITNESS: No, we could yave done it at 3.4. But remember, in my earlier testimony I said we received no specifications from the Tea Company other than a list of stores.

JUDGE HINKES: Very well.

By Mr. Mathias:

Q Is there any place in this offer on any page where it is stated in so many words that the homogenized milk to be supplied to the A&P Company under this quotation, if accepted, would be 3.5 percent butterfat?

MR. McINERNEY: May I have the question read back?

JUDGE HINKES: If you will, please.

(The pending question was read by the reporter.)

THE WITNESS: I thought I had answered that before, Your Honor, but I will give the same answer again.

Although in my mind 3.5 butterfat on the top of page 2 refers to what -- this refers to what we are going to use, and it doesn't say we are going above or below that 3.5.

By Mr. Mathias:

Q It doesn't, however, state the milk will be 3.5 percent butterfat.

MR. McINERNEY: I think the witness's testimony is quite clear.

JUDGE HINKES: I am not sure I understand the last response of the witness. What were you referring to?

THE WITNESS: The top of page 2 says, paragraph 1, "Chicago area prices are quoted on the basis of the present Order Number 30 price, plus a super pool which totals $4.32 per hundredweight for 3.5 percent Class I milk products."

It is my contention that I answered that by saying that this is my belief that I bid on 3.5 percent butterfat and at no place in here does it say I bid less than 3.5 percent butterfat.

By Mr. Mathias:

Q We did cover in prior testimony this 3.5 percent figure is used in connection with Class I milk products, is it not, sir?

A Yes, that is right.

Q And we have just gone through a number of products which varied in butterfat content from 5/10 of a percent up to over 32 percent, which were all Class I milk products; is that not correct, sir?

A That is correct.

Q Referring to Respondent A&P Exhibit 50-S, the similar language is used here, is it not, sir, "Price is quoted on basis of $3.20 per hundredweight on Class II, 3.5 percent milk," is that not correct, sir?

A Yes.

Q What does 3.5 percent milk go into, cottage cheese, sir?

A In some areas, yes.

Q Isn't cottage cheese generally made from skim products?

A It can be made from skim up to 6 percent.

Q Do you know or can you recall at this time the butterfat content of the milk from which the cottage cheese was manufactured by Bowman in the Chicago area at this time period?

A No, I can not.

Q Do you know the most customary butterfat of the milk going into cottage cheese, used for the manufacture of cottage cheese?

MR. McINERNEY: I object. When I previously tried to ask some of the questions with respect to the butterfat content of milk being sold, Mr. Mathias said he was not qualified to answer and Your Honor sustained that objection on the basis of the witness's statement that he had not much to do with the production of these various products.

For that reason, and to keep this examination within some reasonable bounds, I object to the examination.

MR. MATHIAS: The witness stated he was not involved in the processing operations of the Bowman Company. That was my basis of objection for any statements by the witness as to butterfat content of milk being sold by the Bowman Company at that time period.

However, I believe the overall qualifications of this witness which have been used by Mr. McInerney on direct, his duties with the Superior Dairy Company in Canton, Ohio, have gone well beyond those that he had with the Bowman Company and, if he knows of the customary usage in connection with the manufacture of cottage cheese, I believe I should be entitled to an answer.

MR. McINERNEY: I don't know why he should not be entitled to answer with respect to a company he spent three decades with, the Bowman Company, and be allowed to answer with respect to other companys in Chicago.

JUDGE HINKES: I think we will have to have some consistency here. I sustain the objection.

By Mr. Mathias:

Q Mr. Cannon, you have still not answered my prior question as to Respondent A&P Exhibit 50-B, that is the page entitled "Price escallation on milk order prices," as to whether or not there is anyplace else in this offer in which it specifically states that the homogenized milk to be sold under the quotation would be 3.5 percent butterfat.

Is there or is there not, sir?

MR. McINERNEY: I object to that, that reminds me of the old story about, "Apart from everything else, Mrs. Lincoln, how did you like the play?" He is saying apart ---

MR. MATHIAS: We can do without small stories: If there is an objection, let's get to it.

MR. McINERNEY: There is an objection. You are saying if it says so here, doesn't it say so anywhere else as though that had probative value, and it doesn't.

JUDGE HINKES: We are concerned here with the terms of the offer submitted by Bowman. Those terms are contained in a document of many pages. The witness has made reference to page 2 of that document with certain conclusions that he reaches as a result.

I don't think that it is out of the way to inquire whether that is the only basis for his conclusion, looking at the documents, because that will narrow our inquiry in any event.

If there are other reasons or bases in the document, we ought to know about that, certainly, as well.

MR. McINERNEY: I think that is a slightly different inquiry than the one Mr. Mathias directed to the witness.

JUDGE HINKES: It is phrased a little differently, but I gathered that was the purport of his question.

MR. McINERNEY: May we have the question read back?

MR. MATHIAS: I will rephrase the question.

MR. McINERNEY: I would like to hear it if I may.

JUDGE HINKES: If the questioner wants to withdraw the question ---

MR. McINERNEY: I think it has to do with the propriety of this line of questioning. I want to point that out by having the question read back.

JUDGE HINKES: I think you are beating a dead horse. He is going to withdraw the question, so I have nothing to rule on.

MR. McINERNEY: I have a hunch it will be repeated again.

JUDGE HINKES: We will now see how good your hunches are.

By Mr. Mathias:

Q Mr. Cannon, referring to the rest of Respondent A&P Exhibit 50 and without reference to 50-B, is there any place in this quotation to A&P which it is explicitly stated that the homogenized milk to be sold to A&P under the quotation will be 3.5 percent butterfat?

MR. McINERNEY: I have the same objection and I think it is highly argumentative as well.

JUDGE HINKES: I overrule the objection, the witness will answer if he can.

THE WITNESS: Other than on page S, no. On page S it states 3.5 also, he didn't exclude that.

By Mr. Mathias:

Q So it would be your opinion that the cottage cheese would have 3.5 percent butterfat content as well?

A No, you referred to the term 3.5, is it anyplace else but in B. I said, no, other than on S.

Q That figure is included on page S in relation to cottage cheese price escallation?

A That is right.

Q Turning to A&P Exhibit 50, page G, Mr. Cannon, on my copy, although it is rather faint -- I believe it is a little clearer on yours -- there appears to be some additional markings on this page that were not on the original Commission Exhibit 50. There is, I see, in handwriting, "Private Label", and then there is an arrow and then there is a mark by a number of the products listed thereunder.

Whose handwriting is this, sir?

A That is my handwriting.

Q What is the meaning of this, sir?

A These are the items in discussion at sometime with Mr. Schmidt over this bid with this in my hand that we indicated this was where his measure was going to be in wanting private labels and what I could live with in private labels.

Q Am I interpreting your testimony now correctly when I state that only these items so marked were to be packaged for A&P under private label if this quotation were accepted?

A That is correct, sir.

Q So that the record is clear, this would be quarts of homogenized vitamin D, half gallons of homo -- vitamin D fiber; gallons of homogenized vitamin D, glass; gallons, homogenized vitamin D, fiber; pints of half & half; quarts of buttermilk; quarts of Dairy Rich; half gallons, Sta-fit; that is, quarts of Sta-fit and half gallons of 2 percent. Is that correct, sir?

A Yes, that is correct.

Q There is one product in here I am not familiar with, that would be Dairy Rich.

A That is the chocolate flavored milk drink.

Q Sir, in the first column on A&P Exhibit 50-G, there is the title, "Direct cost f.o.b. Chicago area plant." Is that in each case the cost that is computed on Respondent A&P 50-H following?

A Yes, it is.

Q Now, sir, in your direct testimony this morning, you made mention of the fact that in your discussions with Mr. Schmidt as to these figures, that you indicated to him that in this column entitled "Mark-Up", which is the second column on this page 50-G, that there was a profit of approximately 6 percent included in this figure.

Now, I note that on Commission Exhibit 50-I and what has been described as the handwriting of Mr. Schmidt, there is an asterisk in connection with this column and it is marked

"Overhead and Profit (approximately 6 percent)".

A That would be correct.

Q So would you want to amend your earlier testimony to state that in connection with this column you had used the 6 percent figure as representing overhead and profit?

MR. McINERNEY: I object to that. That is quite argumentative. The witness testified there was a profit of 6 percent and Mr. Mathias seems to see some inconsistency between that and saying you take out overhead before you figure your profit. I think it is misleading.

MR. MATHIAS: The witness has already stated this was more correct and he has already answered in the affirmative to my last question.

MR. McINERNEY: The argument is about seeing some inconsistency that is not there and asking about amending something or other.

JUDGE HINKES: The whole thing turns on your definition of profit. Is this gross profit or net profit? When the witness speaks of a 6 percent mark-up, what is he referring to?

MR. McINERNEY: I think he said, Your Honor, there was a 6 percent profit.

JUDGE HINKES: I think we are entitled to know if he is talking of a net profit or gross profit.

MR. McINERNEY: His testimony would not be inconsistent with the notation Mr. Schmidt made.

J JUDGE HINKES: If he meant gross profit, that is one thing. If he meant net profit, that is another.

MR. McINERNEY: Mr. Schmidt didn't talk of net or gross profit, he said overhead and profit.

MR. MATHIAS: I don't see that the notation of Mr. Schmidt is correct. The figure included overhead and profit. This is the statement he made to Mr. Schmidt. I don't see anything to argue about.

JUDGE HINKES: I wasn't sure the witness stated just exactly that. I wanted to be certain I knew what his answer was. For the sake of the record and for my information as well, I would like to have the witness tell me now once again what you are saying is correct, Mr. Cannon.

THE WITNESS: At this point, I am quite confused but, to get back to the points, the statement I made in my direct examination this morning was a 6 percent mark-up and when we talk about mark-up, we talk about gross mark-up.

Now, if Mr. Schmidt made the statement, is overhead included in that, I may have said yes to it. He asterisked on there. I can't say I said yes, but the overhead would be in the 6 percent mark-up.

MR. MATHIAS: The overhead would be in this 6 percent mark-up?

THE WITNESS: Yes.

MR. McINERNEY: Your Honor, may I ask a question?

MR. MATHIAS: He can do that on redirect.

JUDGE WILKES: Keep it in mind, Mr. McInerney.

By Mr. Mathias:

Q Referring to the fourth column on Respondent's Exhibit 50-G, there is a reference to "direct vanning costs to sales area." What is meant by this term?

A That is where it had to be transported from the bottling or processing plant to distribution points. It was averaged out in the cost.

Q In the next to the last column, I see a heading "Commission" What is the meaning of this column?

A That is the wages that the route deliverymen earn, their commissions.

Q Your route deliverymen were paid on a commission basis?

A That is correct.

Q So they were paid so much of a percentage based upon the volume delivered; is that it?

A On a graduated scale, yes.

Q Sir, referring back to the first column, the "Direct cost f.o.b. Chicago area plant," I believe you stated that Mr. Parmalee, with your assistance, computed the cost figures in this offer; is that correct?

A That is right.

Q Now, sir, was the cost figures which are included in this column in A&P Exhibit 50-G based upon the anticipated volume of the A&P business?

MR. McINERNEY: As Mr. Mathias pointed out before, if he knows.

JUDGE HINKES: Yes, if he knows.

THE WITNESS: I can't answer that, I really can't answer that correctly.

By Mr. Mathias:

Q In connection with Respondent A&P Exhibit 50-H, which I believe you have previously described as the basis of the first column on 50-G, the first column on this page, 50-H, refers to the "Raw merchandise cost f.o.b. Chicago Plan." I take it that should be "Plants."

A I assume so, sir.

Q Down below I see Class I price, $4.32 per hundredweight, which is that cited on 50-B as being the federal order price plus a super pool.

Now, sir, do you know whether or not there were any other raw milk costs to the plant other than this basic federal order price and super pool?

A Yes, there were.

Q Were all of the various elements of raw milk cost included in this column entitled "Raw merchandise cost f.o.b. Chicago plants."

A Yes.

Q So that all of the costs of the acquiring of the raw milk would be taken into consideration in this particular column?

A That is correct.

Q This would include, I take it, products such as Sta-fit, this would include fortification that may be put into it; is that correct?

A That is correct, yes.

Q And in the case of homogenized vitamin D milk, any vitamins that were added?

A That is correct, yes.

Q Sir, referring to page 50-L of the A&P exhibit, I see here the heading is "Net prices - Indiana area, store service three day weekly."

A What page is that again, please?

Q Excuse me, I am sorry, I misled you, it is 50-J, the letter was indistinct here.

A Yes.

Q Now, I note, sir, that the figures in the first column on 50-J, which are again entitled "Direct cost f.o.b. Chicago area plant," appear to be the same as those used in 50-G; is that correct, sir?

A Yes.

Q And this would be true of the mark-up as well; is that right, sir?

A Yes.

Q As well as the third column, the "Net price at Chicago area plant?"

A Yes.

Q I note also that in connection with the vanning costs in the fourth column, such costs appear to be slightly higher, would this be due to the additional cost of trucking the milk over into Indiana?

A It is the greater distance.

Q Sir, I do see in the final column "Net delivered price - three days weekly," that the prices are slightly lower than those in metropolitan Chicago and the other areas covered by 50-G. Was this due primarily, if you know, sir, to the fact there was to be three days delivery over in the Indiana area?

A That is correct, sir.

MR. McINERNEY: Mr. Cannon has been on almost an hour and a half. Whenever Mr. Mathias reaches a breaking point, I think a brief recess would be in order.

MR. MATHIAS: I am sorry, Your Honor, I didn't realize so much time had elapsed. This is a convenient point for taking a break.

JUDGE HINKES: Very well, we will take a short recess.

(A brief recess was taken.)

JUDGE HINKES: Back on the record.

You may proceed, Mr. Mathias.

By Mr. Mathias:

Q Sir, I am returning to ASP Exhibit 50-J, the Indiana area quotation. I know there is a column entitled "Commission" on this page as well.

Were drivers paid on a commission basis in this area as well?

A Yes.

Q Was this a union requirement in these areas?

A Oh, yes.

Q Now, sir, referring to Respondent A&P Exhibit 50-L, I believe I am right this time, "Iowa area - three day delivery." I note that directly under the title is the notation "Bowman Dairy Company prices on file with the Iowa Milk Commission." Then on the one side there are two columns entitled "List price," one with the heading "Company brand" and one with "Private label" and on the right-hand side of the page, two columns entitled "Net price", one headed "Company brand" and one headed, "Private label."

What is the meaning of the material on this page?

A This is price control, as I remember, from that day where the State was under price control and you had to post your prices and you had to post a separate price for private label.

Q These were the prices you then had on file with the Iowa Milk Commission?

A That is right, out of our branch. It was the Quad-City area there. I can't think of it. It was Bettendorf, Iowa. That was a processing plant.

Q I was going to ask that. You did have a processing plant in that area?

A That is correct.

Q I note there is a different milk order price listed on this page than on the Chicago and Indiana pages?

A That is correct.

Q I see also, sir, that the amount of the super pool in the Iowa area is listed as ten cents. Do you know whether or not this was the same amount as the super pool in the Chicago plants?

A I don't recall it.

Q Now, referring to A&P Exhibit 50-M, which is again entitled "Iowa area - three day delivery," what is the difference between this page and the previous page 50-L, sir?

A I just don't know, Mr. Mathias. I can't answer that question. I am confused by that page myself.

Q I see a last column on this page which lists different prices than those under the net price column for company brand and private label brand as they appear both on 50-L and 50-M. Referring back for a moment to A&P Exhibit 50-J, the prices appearing in that last column on 50-M appear to be identical.

A Identical to where?

Q To those appearing in the last column on 50-J, which are the Indiana area prices.

A All right.

Q Can you explain if these prices on 50-M are in fact those quoted for Indiana or just what they are, if you know?

A Well, the prices on J are quoted for Indiana only on a three-day a week basis.

Now, please relate that to the Iowa page.

Q The last column on 50-M which is entitled "Iowa area - three-day delivery." But the prices appearing thereunder appear to be quite similar to those in the Indiana area.

MR. McINERNEY: I think it is a little more accurate to say some are and some aren't, Mr. Mathias. I am not sure what the question is, in any event.

By Mr. Mathias:

Q I was hoping that comparison might refresh your memorn, Mr. Cannon, as to what this last column might represent. Can you tell from looking at Commission Exhibit 50-M what price A&P would be paying for private label in the Iowa area under this quotation?

A On 50-M?

Q Yes.

A Yes, the net price they would be paying would be the .1850 for the brand and .1795 for the private. I am going to go one step further, the .1624 is for three days a week.

Q Can you recall at this time that that is the exact case?

A No, sir, I cannot.

Q Under the column "Net price," which is there a difference between company brand and private label brand in this instance in view of Bowman's company policy of selling both at the same price?

A To the best of my recollection, it is because of the state price control regulations in Iowa at that time.

Q Also looking at the column entitled "Net price - private label," it would appear that there are one or two additional items being offered under private label in Iowa as compared to the other areas in your quotation. Would that be correct, sir?

A I didn't compare them, Mr. Mathias. If you will give me the time to look at it. Are you comparing back to the original private label list?

Q Yes, in connection with the Indiana and Illinois area, I believe, in connection with the Illinois quotation where you had checked off, I believe it was 10 or 11 items which would be under private label.

A Yes, I am comparing now.

I am unable to give you a factual answer there as to why.

Q There does seem to be a difference in the number of private label items?

A There does seem to be, yes. They vary also, I might add, from the list to the net price on the same page.

Q Mr. Cannon, in connection with the pricing appearing on A&P Exhibit 50-N in the Iowa area, there appears to be no breakdown on costs in connection with the Iowa sales as there were for the Illinois and Indiana area, why is that, sir?

A As I recall, there was no reason for doing it. These were the best prices they could be given. The State controlled the price out there.

JUDGE HINKES: Is that a minimum or maximum price they control?

THE WITNESS: As I recollect, it was the minimums. That is a long time ago. I am going back in memory on that, too.

By Mr. Mathias:

Q Sir, referring to Commission Exhibit 50-L, the previous page dealing with the "Iowa area - three-day delivery," you indicate that the Boman Dairy prices on file with the Iowa Milk Commission for three-day delivery are those appearing under the "Net price" columns, "Company brand" and "Private label," which are apparently identical to those same columns appearing on 50-M.

MR. McINERNEY: I can't follow that question. Would you mind repeating it?

By Mr. Mathias:

Q The point I am getting at is it would appear if this is a price controlled state and you were required to follow your price filing, the price to A&P in the Iowa area for three-day delivery is shown by the two columns marked "Net price," with "Company brand" and "Private label brand" at the head of the subcolumns on page 50-M.

MR. McINERNEY: What is the question?

By Mr. Mathias:

Q Would this be correct, would you agree with this, sir, that the filed price for private label on three-day delivery for the Iowa area is shown on RAPX-50-L?

MR. McINERNEY: I still don't understand the question, Mr. Mathias, but I think you have been examining the witness for quite some time now asking him to simply read out what is on these sheets and I really think we have gone pretty far afield. There is no need for him to read to you what is already in evidence.

MR. MATHIAS: That is not quite the case, Your Honor. The last column on 50-M of the Respondent's exhibit is untitled and the witness has stated that he believed that last column might be the price granted to A&P for three-day delivery.

JUDGE HINKES: Let me ask the witness, then, to be sure I understand.

If the price for "Quarts homogenized - vitamin D" for three-day delivery is .1524?

THE WITNESS: Yes.

JUDGE HINKES: What is the meaning of the prices shown in the other columns?

THE WITNESS: More deliveries.

JUDGE HINKES: More than three days?

MR. MATHIAS: This is what prompted my question. A&P Exhibit 50-L, which is also listed Iowa 3 delivery Bowman Dairy company prices on file with the Iowa Milk Commission, which appears to be for three-day delivery lists the higher prices appearing on 50-M.

MR. McINERNEY: I think I can explain it, if I may.

MR. MATHIAS: I don't believe Mr. McInerney should explain it.

JUDGE HINKES: I would like to hear it from the witness first if possible.

THE WITNESS: I can only give you an assumption and it has been disregarded up to this point on the part of Mr. Mathias. There are two different dates on these sheets. This is dated a later date, 9/23/65 and this is the date of the proposal, 8/31/65. I will have to assume there may have been some relief from the Commission where there was a change in the pricing schedule.

JUDGE HINKES: That is an assumption on your part?

THE WITNESS: That is an assumption on my part.

By Mr. Mathias:

Q You do not know whether that is a fact?

A No, I do not know that is a fact.

Q Now, Mr. Cannon, referring to A&P Exhibit 50-M, which is entitled "Exhibit D net delivered prices," under a main title "Net prices," there are three subcolumns, one entitled "All stores," one entitled "70 percent of stores," and the other entitled "50 percent of stores." There are three separate prices shown for each of the various products depicted hereon under each of these columns.

A Yes.

Q In connection with those prices under "50 percent of the stores," sir, that would be the last column. Were these prices developed on the basis of the costs calculated in connection with the estimated volume of 50 percent of the stores?

A Yes, the volume going through the plant, correct.

Q And in connection with 70 percent of the stores, did you and Mr. Parmalee calculate these prices out on the basis of the volume that you would realize in your plant from 70 percent of the stores?

A Yes.

Q Now, sir, in response to questioning by Mr. McInerney on direct, you had stated that you would have made this offer to other of your customers such as Kroeger and ~~Hi-Lo~~ High-Low. At the time the offer was made to A&P, was it made to any other customers?

A No, sir.

Q Was this considered? Did you consider making the offer at the same time you made it to A&P?

A We discussed it, yes, but we decided we did not have the right to offer it then because we wouldn't have the volume in the plants to bring the cost down.

Q You were dependent on this additional volume in order to offer the prices included in your quotation?

A That is correct, yes.

Q Why was this new volume so important to this offer?

A I don't think it was that important.

I don't follow the question, Mr. Mathias.

Q Why was it important to obtain additional volume in your plant before you could offer these prices to the competitors of A&P?

A You are prorating the cost of your total operation, all equipment, all machinery, the buildings, everything over more units, that brings your fixed burden down.

Q If A&P had accepted this offer, would you have made the same identical offer to other accounts?

A Like size accounts.

Q In other words, Kroeger and ~~Hi-Lo~~ High-Low?

A Yes.

Q Would you have made the offer available to independent stores or chains of a few stores?

A No, sir, we didn't have them to offer it.

Q I don't understand that.

A We didn't have the others to offer it to. Those were the only two chains we had left at that time, Kroeger and Hi-Lo.

Q You did serve other stores?

A That is right, independent stores.

Q Would you have offered it to any of the independent stores?

A No, sir.

Q In your dealings with Mr. Schmidt, did he ever ask you if this offer was available to A&P's competitors?

A Yes.

Q Did he ask you if you were then charging any of the A&P competitors on the basis of this pricing system?

A Would you do that over for me? I am not sure I understand it.

Q Did Mr. Schmidt ask you if at that time, the time of the offer, you had made this pricing offer available to any of A&P's competitors?

Q Yes.

A I don't recall that, no, sir.

Q Now, sir, I note that in connection with the Illinois market area that your quotation offered to serve the A&P stores on a six-day delivery basis; is that correct, sir?

A That is correct.

Q Was there any reason why this was so?

A Yes.

Q What was that?

A Union requirements.

Q What union -- I take it this is your drivers union?

A That is correct, sir.

Q What drivers union did your routemen belong to in Chicago?

MR. McINERNEY: I think this is well beyond the scope of direct, Your Honor.

JUDGE HINKES: I think it is necessarily connected to the previous answer of the witness. I don't think we need to go any further than that, but counsel is entitled to an answer to his question.

THE WITNESS: Teamsters Local 753.

By Mr. Mathias:

Q In the Indiana area, I believe you mentioned you paid your drivers a commission there and that this was a matter of union contract. Do you recall what union was involved in the Gary, Indiana area?

A I can only recall that it was a Teamster Local, I don't recall the number.

Q Would number 835 refresh your memory?

A That could be it.

Q But your routemen there were members of the local Teamsters union?

A They were, yes.

Q In connection withe the areas where you offer three-day delivery, is it possible that some of the A&P. stores would not be equipped to take three-day delivery?

MR. McINERNEY: I object, Your Honor.

JUDGE HINKES: I don't think we want to talk about possibilities, do we, Mr. Mathias?

MR. MATHIAS: The reason I am getting into this at least in one of the zones involved in this matter, insofar as the Borden offer was concerned, three-day delivery was made available to the stores and yet a few of the stores chose to take a greater number of days' delivery.

MR. McINERNEY: I still don't see that the question is at all competent.

MR. MATHIAS: I am asking does he know if some of these stores ---

JUDGE HINKES: That was not your question.

By Mr. Mathias:

Q Do you know whether some of the stores in the Indiana area were not equipped for three-day delivery?

A I do not know.

Q Sir, do you know whether or not the union requirements in Lake and Porter Counties would permit three-day delivery at this period of time?

A I do know that, yes.

Q Is it your opinion that it would?

A They did permit less than six days a week.

Q Sir, between the time that you had completed your dealings with Mr. Schmidt and the time you were first contacted by A&P counsel, I believe that it has been previously noted on this record that you hadn't done a great deal of thinking about these negotiations?

A That is correct.

Q Would it be correct to say that your recollection is hazy as to many portions of the dealings and surroundings of these various negotiations?

MR. McINERNEY: I object to that.

JUDGE HINKES: I think I must sustain the objection. I think that an overall question such as that is meaningless. I think the inquiry should be made with specific questions when you have them and not a summary. Obviously, some events may be very clear in this witness's mind.

Unless you wish to ask the witness whether all of it is hazy, that would be permissible, but to say that "most," then we won't know anything.

By Mr. Mathias:

Q Were all of your recollections hazy as to most of these events?

A No, sir.

Q You are quite certain that union regulations allowed three-day delivery at this time?

A Yes.

Q Do you recall the name of the Bowman employee who was the branch manager in Gary, Indiana at this period of time, sir?

A I believe it was John Kalchbrenner. The reason I am slightly hazy there is there was a retirement just about that time when a Mr. Al Selmer left.

Q At the time of this quotation, did you have any discussions with any union representative in the Indiana area?

A No, sir, none that I can recall.

Q Now, sir, referring again to your A&P Exhibit 50-H -- excuse me, G and H. Strike the question.

Mr. Mannon, it has been established in your previous questioning that Bowman subsequently sold out its operations to Dean in January of 1966; is that correct, sir?

A That is correct, yes.

Q And Bowman at that time ceased to exist in the Chicago market?

A That is correct, yes.

Q In your opinion, would there have been any change in this decision to sell out had Bowman obtained the A&P business volume involved here?

MR. McINERNEY: I object to that, I think it calls for speculation and no groundwork has been laid for it.

MR. MATHIAS: The man was general manager of their operations at this point. I believe he is qualified to state an opinion.

MR. McINERNEY: He already said he knew nothing of the negotiations that lead up to that.

MR. MATHIAS: Prior to August 31, he stated that. He has not said he knew nothing of the negotiations after that.

JUDGE HINKES: I am going to allow him to answer the question. The gentleman was a member of the company and had an assumed familiarity of the processes that must have gone on.

You may answer.

MR. McINERNEY: Would you like the question read back?

THE WITNESS: Yes, and I will only give you a factual answer, not an assumption.

JUDGE HINKES: Do you recall the question?

THE WITNESS: No, I would like it repeated.

JUDGE HINKES: Would you read the question?

(The pending question was read by the reporter.)

THE WITNESS: I had no factual information regarding that at all.

JUDGE HINKES: Where was the decision made to sell, at what point of position within Bowman?

THE WITNESS: I would not know that answer. I was only an associate director. That was decided by the directors themselves.

JUDGE HINKES: You did not participate in that?

THE WITNESS: No.

By Mr. Mathias:

Q Was there any discussion at any meetings you attended?

A Yes, there were.

Q What was the earliest date of such a discussion in which you took part?

A Sometime in November or December of 1965 they finally brought the rest of us into it to start telling the story and that story wasn't told to us. It was told to us that they were considering production mergers. This is how this whole thing got started and apparently they had been talking about it for some time.

Q It was indicated they were talking about it for some time?

A That is an assumption, I really don't know that for a fact.

MR. MATHIAS: If I may have a few minutes' break, I don't believe I have a great deal more cross, but I would like to go through my notes.

JUDGE HINKES: Very well.

MR. MATHIAS: We would like to have about five minutes.

JUDGE HINKES: Very well, we will be in recess for another five minutes.

(A brief recess was taken.)

JUDGE HINKES: Back on the record. Mr. Mathias?

By Mr. Mathias:

Q Mr. Cannon, you told us in repponse to an earlier question that Mr. Schmidt did ask you in this offer would be made available to A&P's competitors. Did you inform him, as you have us, that this would be made available to your other chain store customers?

A I informed him it would be made available to them, but I would never tell him it would be the same price. We never gave that information out, to be honest with you.

Q Since you have moved to Canton, Mr. Cannon, have you had any business association with A&P in that market area?

A Very little. I called on them at the Cleveland office a number of times, but I have done no business with them directly myself. I have not secured the business in any way. The little bit we had was there before I came to Canton.

Q You have been soliciting business?

A Yes.

MR. MATHIAS: No further cross, Your Honor.

JUDGE HINKES: Mr. McInerney?

REDIRECT EXAMINATION

By Mr. McInerney:

Q Mr. Cannon, you told us in submitting this bit, A&P Exhibit 50, you were offering A&P milk with a 3.5 percent butterfat content at those prices and that if the butterfat content would be reduced, that you would reduce the price to A&P in accordance with the value of the butterfat?

MR. MATHIAS: I will object to this form of questioning. This is Mr. McInerney testifying. It is Mr. McInerney's witness. I believe this is highly irregular. It is a summatio
I don't recall any testimony exactly of the nature of that stated by Mr. McInerney and I believe it is highly unfair for

him to characterize the testimony and try to summarize it in such a way to his own witness.

JUDGE HINKES: I believe you should avoid that, Mr. McInerney.

MR. McINERNEY: I was trying to save time, Your Honor.

JUDGE HINKES: I don't question your good faith, but you could be wrong and prejudice the record.

By Mr. McInerney:

Q In offering this bid, were you offering A&P the price stated therein at 3.5 percent butterfat content?

A Yes.

Q If that butterfat had been reduced, would you have given A&P lower prices in accordance with the butterfat taken out?

A Yes, we would have.

Q In response to a question from His Honor, you said that you would be legally free to reduce the butterfat content down to as low as 3.25 percent, do you recall that?

A That is correct, I do.

Q If you had done that, would you have given A&P the benefit of whatever reduction resulted in your cost?

A Yes, we would have.

Q Now, if Bowman had in fact reduced the butterfat content of the milk being supplied to A&P lower than 3.5 and didn't tell A&P about that and instead kept the ~~ruling~~ resulting cost saving for itself, would you consider that honest?

A No, sir.

MR. MATHIAS: I am going to object to that question strenuously; first of all as being hypothetical, secondly as being quite leading, third as being totally irrelevant in any event.

JUDGE HINKES: I will sustain the objection. What the witness may have thought is not relevant to this proceeding. Perhaps what he would have done was another story but what he might have thought we shouldn't get into.

By Mr. McInerney:

Q Would that have been consistent with what you were offering to A&P in Exhibit 50?

MR. MATHIAS: I will object again that the question is tainted and improper to this witness.

MR. McINERNEY: I object to the adjectives "tainted" and "improper."

I think the question is relevant to get the witness's opinion as to whether the butterfat content was consistent with the offer he was making.

JUDGE HINKES: I will allow it.

THE WITNESS: We would not have reduced the butterfat content without talking to A&P about it and discussing the facts with them.

Q If you had reduced the butterfat content without talking to

A&P, would that have been consistent with the offer you were making in Exhibit 60?

MR. MATHIAS: I object. It is highly speculative and irrelevant.

JUDGE HINKES: It is speculative, but I will allow him to answer it.

MR. McINERNEY: Would you like the question read back?

THE WITNESS: Yes.

JUDGE HINKES: The question was whether it would be consistent with Bowman's policy.

(The pending question was read by the reporter.)

THE WITNESS: No, it would not have been consistent.

By Mr. McInerney:

Q You told us Mr. Schmidt said from the outset he wanted Bowman to quote prices which would result in a profit. Do you recall that?

A I do, yes.

Q Did he tell you why A&P would care whether or not Bowman made a profit?

A I don't recall that we really discussed it in that kind of detail.

Q Do you have any idea as a result of your previous deals with A&P as well as others why A&P would care whether or not Bowman made a profit?

MR. MATHIAS: I object, Your Honor.

JUDGE HINKES: I will sustain the objection. That is going a little too far.

By Mr. McInerney:

Q Has anyone from A&P ever communicated to you the interest of the company in having its suppliers make a profit?

A Yes.

Q Who was that and would you tell us generally what was said?

A Yes, I can go back to many buyers that discussed it, Mr. Harshbarger was one, before him, Mr. Brick Carter.

Q What was their position with respect to that?

MR. MATHIAS: I will object to this line of questioning as not being proper redirect. There was nothing of this gone into on cross.

MR. McINERNEY: There was something on profit as I recall it.

MR. MATHIAS: We straightened out one figure and that hardly goes into this line.

JUDGE HINKES: That is correct. This is along the same line you questioned your witness on direct examination, Mr. McInerney. I don't think it is proper redirect.

By Mr. McInerney:

Q In your discussions with Mr. Schmidt about the mark-up that Bowman was adding in this Exhibit 50 to which we have been referring, you told him that that would include a profit, as I recall; is that correct?

A I did, yes.

Q Mr. Mathias showed you Commission Exhibit 50, which has the same page as A&P Exhibit 50. In Commission Exhibit 50, the page is I and in A&P exhibit, the page is 6. He called your attention to a notation made by Mr. Schmidt with an asterisk to the mark-up column and then the asterisk, the footnote reads "Overhead and profit approximately 6 percent."

Is that notation in any way inconsistent with what you told Mr. Schmidt with respect to your profit?

A I don't believe it is.

Q Mr. Mathias asked you if Mr. Schmidt had asked you if this offer, Exhibit 50, would be made available to competitors and you said that he had. He much later asked what you said about that and you said that it would be, you told Mr. Schmidt it would be, but that you didn't specify the price, as I recall your testimony?

A That is correct, sir, yes.

Q In fact, however, had you not previously decided within the Bowman organization that if A&P had accepted this offer that it would have been made available on the same terms to Kroeger and High-low ~~Hi-Lo~~?

A We had decided that, yes.

MR. McINERNEY: Now, sir, Mr. Mathias has made some reference to an affidavit that I supplied to him and has raised some question about this witness's recollections at the time that I first spoke to him sometime in January or February of 1973, which is also the date of the affidavit and, in view of the observations that have been made about it, I would like to offer the affidavit in evidence. I think it is appropriate so there won't be any hint in this record that there is anything inconsistent between that testimony and the testimony of Mr. Cannon here today.

MR. MATHIAS: I believe that is totally unnecessary. There has been no question by complaint counsel on cross or any other time that Mr. Cannon has made any inconsistent statements. The witness has appeared on the stand and has testified.

This exhibit would be totally superfluous and the witness has stated he has given it a great deal of thought since then and there might have been some things he would change in there.

MR. McINERNEY: He has not said that I object strenuously to that. I renew my offer in view of that, which is totally inconsistent with the record.

JUDGE HINKES: If this were offered by Mr. Mathias with such a claim, I think it could be received. But, since it is being offered by you without any indication I am aware of, that there is inconsistency, it can not be received.

MR. McINERNEY: I think Mr. Mathias's remarks are totally unfounded that Mr. Cannon might change something in that affidavit.

JUDGE HINKES: Mr. Mathias's remarks are totally irrelevant as far as I am concerned. I dred the day I have to consider counsel's remarks as evidence.

Let the record be clear now, Respondent A&P Exhibit 52 is rejected. I must make a formal ruling and it should be put in the rejected file.

(The document referred to was marked for identification as Respondent A&P Exhibit 52 and was rejected.)

JUDGE HINKES: You may go on.

By Mr. McInerney:

Q I believe you told us following this conversation with Mr. Schmidt in which you discussed the various matters about profitability and other things, you left with a feeling of elation and reported the instance or meeting to your superiors at Bowman Dairy.

MR. MATHIAS: I object to this as being beyond the cross. Complaint counsel did not go into the various meetings between A&P and Mr. Cannon. I didn't ask one single question about that.

JUDGE HINKES: Let's hear the question. This is only an introduction.

MR. McINERNEY: Yes, Your Honor.

By Mr. McInerney:

Q Is that memory of that meeting with Mr. Schmidt and your elation following that meeting quite a vivid recollection even today?

MR. MATHIAS: I object. What is the relevancy?

JUDGE HINKES: There has been some question as to the vividness of this witness's recollection of the events and to that extent ---

MR. MATHIAS: Is this question being asked to the total meeting or the feeling of elation?

MR. McINERNEY: The question speaks for itself.

MR. MATHIAS: Can you read it back?

(The pending question was read by the reporter.)

THE WITNESS: Yes, it is very vivid in my recollection. I compare it to the day I was married.

MR. McINERNEY: I have nothing further, Your Honor.

JUDGE HINKES: Do you have anything else, Mr. Mathias?

EX

RECROSS-EXAMINATION

By Mr. Mathias:

Q Mr. Cannon, in your prior testimony, you have indicated that you could have legally reduced the butterfat content of your homogenized milk to as low as 3.25 percent. You have also indicated in your testimony that Mr. Schmidt did not set out any specifications as to the milk products he desired in his request for a bid from you.

Now, when you were contacted by Mr. Schmidt and informed that there was very little difference between your bid and the competitive offer and that the other offer was being accepted, did you offer to reduce the butterfat content in your milk and give a lower price?

A No, sir, we were not given any further opportunity to make any more bids or any more offers to the Tea Company.

Q Did you make any protest to Mr. Schmidt that you could shave your butterfat content and give him a better price?

A No, I did not. I was not aware that was a bone of contention at the time.

Q Mr. Cannon, why did you offer 3.5 percent milk to A&P?

A . Going back into the history of when we served them before, Mr. Mathias, we used the same policy that we had served them before, because we had been given no specifications by the Tea Company.

JUDGE HINKES: Is there anything else, Mr. Mathias?

MR. MATHIAS: One moment, sir, there may be. No further questions, Your Honor.

MR. McINERNEY: No further questions.

JUDGE HINKES: You may step down, Mr. Cannon.

(Witness excused.)

JUDGE HINKES: I gather there is nothing else for today. In that case, we are scheduled to resume on Tuesday morning at 10 o'clock; is that correct?

MR. McINERNEY: That is correct.

JUDGE HINKES: We will be in recess until that time.

(Whereupon, at 3:50 p.m., the hearing was recessed, to reconvene at 10 a.m., Tuesday, March 19, 1974.)

* * *

purchase of the merchandise from that type of company.

Q Were you purchasing the products you have described for the entire company?

A I purchased for the entire company.

Q Did your position with the company change in 1964?

A In 1964 the company elected to bring me to New York City at which time I was appointed National Director of Purchases.

Q Would that be National Director of Purchases for the entire company?

A That included the purchasing of all merchandise that was sold in the stores to the retail public.

Q And that would include milk and dairy products?

A Including milk and dairy products, meats, produce, groceries, everything that the consumer buys.

Q How many products approximately are we talking about?

A In the grocery line between 7,000 and 8,000 which would be the average number stocked in a normal sized supermarket.

Q How long did you hold this position as National Purchasing Director?

A I was actually National Purchasing Director for about four years. During 1964 I was elected as a Corporate Director of the Tea company and the following year, 1965, I was elected Corporate Vice President, and in 1968 I was elected as Executive Vice President and continued in that capacity until 1971 when I was elected Vice Chairman.

Q While you were Executive Vice President were you also a member of the Executive Committee of the company?

A I was a member of the Executive Committee at that time and have continued as a member of the Executive Committee.

Q As National Purchasing Director did Hershel Smith report to you, sir?

A Hershel Smith did report to me. He had a number of duties, the principal one being the purchase of milk and dairy products.

Q During the period 1964 through 1970 when you held the position as National Purchasing Director as well as that of an officer of the company and a director of the company, did you participate in meetings and discussions at which policies of the company were both reviewed and formulated?

A Yes. We had frequent meetings between the various officers of the corporation to determine in broad outlines the policy that was to be pursued in the purchasing of merchandise and the sale of merchandise and in the development of stores and all of the various matters that related to the overall operation of the company.

Q Did your duties include the implementation of those policies at both the division and the unit level ~~through~~ to the the men who worked under you ~~annual work done to you~~?

A That was my responsibility, to communicate with them, sometimes through headquarters buyers and sometimes directly.

Q Now did A&P have a policy during the period 1964 through

1970 with respect to the sale of private labeled products in its stores?

A Yes, we did have a policy wherever it was feasible.

Q Did A&P in this same time period have a policy with respect to the sale of private label milk and dairy products in its stores?

A We had a policy the same as we did on other products, other grocery products.

Q Which was to promote the product where it was feasible?

A That is correct, sir.

Q What were the reasons behind the company's policy for providing private label milk and dairy products?

A There were several reasons. In the first place, it gave us a great deal more flexibility in supplying the milk products as well as other products because we had more suppliers. In addition, it gave us a real advantage in that we had under our own brand that the public could only buy in our own stores so that it had a tendency to draw additional traffic through our stores. Finally, of course, one of the main reasons for business is to make a profit and we felt that through the development of private brands that we were able to increase our gross profit.

Q Did the A&P Tea Company introduce private label milk and dairy products in its store during this period of time, 1964 to 1970?

A Yes, we did, in a number of divisions.

Q Did the A&P Tea Company introduce private label products -- I am talking now about milk and dairy products -- in both New York and Chicago?

A Yes. In 1964 we introduced it in New York and in Chicago in ~~1964~~ 1965.

Q Could you tell us what the dollar saving was that was projected in New York at the time of the switch from brand label to private label?

A Yes. It was in excess of $1 million annually.

Q Mr. Corbus, during the period 1964 through 1970 did A&P have a procedure that was to be followed by the buyers at the unit or the division level when they sought to either change a milk supplier or sought to change from brand label to private label milk, and if so, would you tell us what that procedure was?

A Yes. The company had a very definite policy. We asked and instructed the Divisional Purchasing Directors to contact responsible, reliable diaries and to obtain from them competitive bids for private label, analyze them, and then finally decide which in their opinion was the best one to submit to headquarters for review by our head milk buyer who at that time was Hershel Smith, and if in Hershel Smith's opinion the arrangement was a satisfactory one he would then discuss it with the Legal Department to eliminate as far as possible any possible legal complications.

Q During this period of time then were the actual negotiations between the A&P representative and the potential supplier carried on by people at the unit and division level?

A Yes. At that time they were carried on by the local or divisional buyer.

Q Has that procedure been changed?

A Yes.

MR. SCHFFING: I object, Your Honor. I think that goes beyond the scope of the dates involved, 1962 through 1970, and I am somewhat dubious about the relevance of such testimony.

JUDGE HINKES: Mr. Curnin.

MR. CURNIN: Your Honor, I think that when the Court hears the testimony, and I realize the ruling has to be made prior thereto, but that this goes very directly and very clearly to the question of relief. We are talking here about procedures which have been in effect concerning the buying of this particular product and how that procedure was implemented at the various levels of unit division in headquarters. That procedure has been changed.

I think that the changes that have been made should be placed on this record and that Your Honor and any reviewing court should be aware of the steps or procedures that have been implemented to insure even greater control over the purchase of this particular product in the A&P Company. It is true that the change that has occurred is a change that was brought about subsequent to 1970 but it bears directly on this case because it relates to the procedures that are now being followed in connection with the solicitation and the purchase of milk and dairy products from suppliers all across the country.

JUDGE HINKES: I will overrule the objection. You may continue.

MR. SOEFFING: Your Honor, in that regard I am not going to question your ruling and I will abide by it but could we have a time period as to when this did happen?

MR. CURNIN: Yes, Your Honor. I will pursue the change, when it occurred and why it was brought about.

By Mr. Curnin:

Q Mr. Corbus, you have told us that this procedure has been changed. Would you tell us first when the change was implemented?

A The change was implemented in September 1973.

Q Will you tell us what the change is and what new procedures have been implemented by the Great Atlantic & Pacific Tea Company in connection with its purchase of milk and dairy products throughout the country?

A Your Honor, we decided that it was better to bring the purchasing of milk for the entire company into headquarters for the reason that many of our local or divisional buyers simply did not have the expertise in the buying of milk that we felt our headquarters buyer would have and that we would have a better control, a firmer control, and more knowledgeable negotiation and for that reason at least it was under my direction to inform the Retail Division that from here on in after September of last year that the purchasing of milk and ice cream and other dairy products be brought into New York for handling under the direction of, it happens to be, Mr. Earl Pilgrim who has spent most of his business lifetime in the dairy industry.

Q Would it be correct to say then, Mr. Corbus, that the purchasing of milk and dairy products for the tea company throughout the country has now been centralized under the direction and control of the headquarters buyer and that position is now being held by Mr. Earl Pilgrim?

A That is correct. There was one additional advantaga due to the fact that the headquarters buyer had ready contact with the Legal Department which of course we did previously but there is an interplay of communication that was not possible under the previous arrangement.

Q And now the headquarters buyer is familiar with the actual negotiations between himself and the dairy, which information was not personally known to the headquarters buyer under the previous procedure.

A That is correct because the negotiations actually conducted

in New York by our buyer there were directly with the supplier whereas before all the headquarters buyer did was to review what was done locally.

Q And he would review what was submitted to him by the local unit or division personnel who had themselves conducted the negotiation?

A That is right.

Q Now, Mr. Corbus, during the period 1964 to 1970 did A&P have a procedure that its unit or division buyers were to follow in soliciting quotes from suppliers, including dairy suppliers?

A Yes, we had a very definite procedure. First, of course, we have to be competitive. We realize that the consuming public was very conscious of the price of milk so that, number one, we did have to be competitive. Number two, we were not a price leader. We would meet competition but based upon our experience we had learned that if we did cut our price of milk that it was immediately met by our competition with the result that there was no particular advantage gained so far as we were concerned. In addition, we instructed our buyers that in their negotiations they were to inform the supplier when submitting his quotations to us that he should include a reasonable profit.

Now I am not prepared to say, nor do I know, what the supplier's costs were or what he would consider a reasonable profit but we felt that it was very important that this arrangement worked well for both sides. In other words, if it was one sided, it simply would not function and could not last.

Carrying it to a further extreme, if the supplier didn't make a reasonable return, we knew that sooner or later he would either have to discontinue being our supplier or go out of business which in turn would be to the disadvantage of the tea company since we need good, healthy suppliers and as many as possible.

Q Mr. Corbus, the duties and responsibilities of those in A&P responsible for purchasing products and those responsible for the sale of products in its stores, were these duties and responsibilities established throughout the company in its divisions and units as a matter of company policy?

A Yes. These policies were clearly spelled out both verbally as well as in written form.

Q Under this policy who had the responsibility for establishing the retail price at which any product would be sold out of an A&P store, including milk and dairy products?

A The authority and sole responsibility for that was placed squarely in the hands of the sales manager at divisional level.

Q Now did the Unit Buyer or the Division Purchasing Director have during this period of time any responsibility or any authority whatsoever in connection with the establishment or setting of retail prices on any product out of any A&P store?

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